STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1836

State of Minnesota,
Respondent,

vs.

Jeffrey A. Bauer,
Appellant.

Filed August 25, 2009
Affirmed
Schellhas, Judge

Anoka County District Court
File No. K0-06-8015

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, 2100 Third Avenue, 7th Floor, Anoka, MN 55303 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant was convicted of two counts of criminal sexual conduct based on sexual penetration of a girl when she was 12 and 13 years old. Raising numerous claims of error, he challenged his convictions, this court affirmed, and appellant sought further review from the Minnesota Supreme Court. The supreme court granted review and remanded to this court for reconsideration of the district court's denial of appellant's for-cause challenge that resulted in appellant exercising all five of his peremptory challenges.

We conclude that (1) the juror was not subject to a for-cause challenge under Minn. R. Crim. P. 26.02, (2) Minnesota does not recognize an implied-bias challenge based on circumstances not listed in rule 26.02, and (3) appellant was not prejudiced because the juror did not actually sit on the jury.

FACTS

A jury found appellant Jeffrey Allen Bauer guilty of two counts of first-degree criminal sexual conduct based on penetration of victim A.E.B. on four occasions when A.E.B. was 12 and 13 years old. The jury found appellant guilty of counts one and three and not guilty of counts two and four.[1]

In jury selection, appellant moved to exclude Juror 42 for cause in connection with his disclosure in his jury questionnaire that his wife was involved in an ongoing investigation through the Anoka County Sheriff's Office. Upon inquiry by the district

[1] This court's previous unpublished decision erroneously states that appellant was found guilty of count four. *See State v. Bauer*, No. A07-1836, 2009 WL 112842, at *1-2 (Minn. App. Jan. 20, 2009) (stating verdict).

court, Juror 42 explained that when his wife was 13 to 15 years old, a coach had inappropriate sexual contact with her. The juror's wife had not spoken about the sexual contact for years but was finally dealing with it in counseling. Juror 42 disclosed that his wife had reported the sexual contact to the Anoka County Sheriff's Office, which had been investigating the matter for "the last month or so." Juror 42 also disclosed that either he or his wife, or both of them, had been in contact with the Anoka County Attorney's Office, the same office prosecuting appellant.

The district court explained to Juror 42 that this case involved allegations of sexual conduct with a young female when she 12 and 13 years old and asked, "Do you think that you can be fair and impartial in this kind of a case in light of what is going on with your wife's situation?" Juror 42 answered, "I think I can look at them as separate incidents." Defense counsel argued that even if Juror 42 sincerely believed in his ability to be impartial, the district court could conclude, based on the circumstances, that the juror could not be fair and impartial. The court denied the motion to remove Juror 42 for cause, and appellant removed Juror 42 with a peremptory challenge.

In affirming the district court's denial of appellant's for-cause challenge of Juror 42, we relied on appellant's assertion in his brief that he had not exercised all five of his peremptory challenges. *Bauer*, 2009 WL 112842, at *2. Upon further review by the supreme court, appellant represented that he had exercised all five peremptory challenges, contrary to the representations in his brief to this court, and the supreme court remanded for our consideration of the corrected record. On remand, we address only the

issue remanded to us by the supreme court: whether the district court erred in denying appellant's for-cause challenge to Juror 42.

D E C I S I O N

Appellant argues that (1) Juror 42 was subject to a for-cause challenge, (2) prejudice from the ruling is not required for reversal, and (3) regardless, the ruling was prejudicial.

For-Cause Challenge

"A fundamental guarantee of the United States Constitution is the right to a fair trial by an impartial jury." *State v. Flournoy*, 535 N.W.2d 354, 361 (Minn. 1995) (citing U.S. Const. amend. VI). "The Minnesota constitution has an identical provision." *Id.* (citing Minn. Const. art. I, § 6). As addressed more fully below, in certain circumstances, wrongful denial of a challenge to a juror for bias can deprive a defendant of a fair trial. *See, e.g.*, *State v. Barlow*, 541 N.W.2d 309, 311-12 (Minn. 1995) (discussing removal of jurors based on bias).

Generally, a biased juror is subject to removal for cause. Minn. R. Crim. P. 26.02, subd. 5. And generally, bias on the part of a juror can be actual or implied. *State v. Brown*, 732 N.W.2d 625, 629 n.2 (Minn. 2007). "[A]ctual bias is a state of mind on the part of the juror, in reference to the case or to either party, which would prevent the juror from trying the issue impartially and without prejudice to the substantial rights of either party." *Id.* "An implied bias . . . is a bias that is conclusively presumed as a matter of law." *Id.* Implied bias has been presumed in "'extreme' situations where the prospective juror is connected to the litigation at issue in such a way that is highly unlikely that he or

she could act impartially during deliberations." *Id.* (quoting *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992)).

Before Minnesota adopted rules of criminal procedure, a Minnesota statute provided specific circumstances in which a juror could be subject to a for-cause challenge based on implied bias, such as where a juror had a family or attorney-client relationship with the defendant or the victim in a case. Minn. Stat. § 631.31 (1978) (repealed 1979). The statute provided "the exclusive grounds for challenge for implied bias." *Schoeb v. Cowles*, 279 Minn. 331, 333, 156 N.W.2d 895, 897 (1968).

Rule 26.02, subd. 5 now provides the exclusive grounds on which jurors may be challenged for cause. *State v. Roan*, 532 N.W.2d 563, 568 (Minn. 1995). The first ground listed in the rule is "[t]he existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging." Minn. R. Crim. P. 26.02, subd. 5(1). This corresponds to situations of actual bias. *See Brown*, 732 N.W.2d at 629 n.2 (describing actual bias). Juror 42 was not subject to an actual-bias challenge because there was no evidence that Juror 42 had a state of mind that would cause him to be unable to try the case impartially. Appellant did not base his challenge before the district court on any admitted state of mind but, rather, on Juror 42's circumstances.

The last seven grounds listed in rule 26.02 correspond closely to the grounds for an implied-bias challenge under the former statute and are stated in the rule as follows:

> 5. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case.
>
> 6. Standing in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted.
>
> 7. Being a party adverse to the defendant in a civil action, or having complained against, or been accused by the defendant, in a criminal prosecution.
>
> 8. Having served on the grand jury which found the indictment, or an indictment on a related offense.
>
> 9. Having served on a trial jury which has tried another person for the same or a related offense to that charged in the indictment, complaint, tab charge or a related indictment, complaint or tab charge.
>
> 10. Having been a member of a jury formerly sworn to try the same indictment, complaint, tab charge or a related indictment, complaint or tab charge.
>
> 11. Having served as a juror in any case involving the defendant.

Id. at subd. 5(5)-(11). Rule 26.02 does not include as grounds for a for-cause challenge any general or catch-all provision that would allow exclusion for implied bias where a court finds that a juror is unlikely to be able to be impartial based on circumstances not listed in the rule.

Appellant argues that the district court should have excluded Juror 42 because "the rules recognize that prior involvement with a defendant or related charges can impair a

juror's partiality." But Juror 42's circumstances do not fall within any of the grounds listed in rule 26.02. We therefore conclude that Juror 42 was not subject to a for-cause challenge under the rule.

Appellant argues that, even if Juror 42's circumstances are not covered by the rule, this court should apply the implied-bias doctrine that other jurisdictions apply to ask if the juror's circumstances were such that the district court should have presumed that he could not be fair or impartial. But the Minnesota Supreme Court has repeatedly rejected use of an implied-bias challenge based on circumstances that are not listed in rule 26.02.

In *State v. Stufflebean*, 329 N.W.2d 314, 317-18 (Minn. 1983), the defendant argued that the district court erred in refusing to exclude a juror who was an employee of a corporation owned in part by the victim's father, arguing that though the juror was not an employee of the victim (a circumstance covered by the rule), "the policy behind the rule" supported excluding the juror. The supreme court rejected the argument and concluded that "[r]ule 26.02 provides the exclusive grounds to challenge for implied bias." *Stufflebean*, 329 N.W.2d at 318. Similarly, in *Roan*, 532 N.W.2d at 568, the supreme court rejected an argument that a juror should have been removed for cause because the juror's niece had been murdered, stating that "[c]rime victim status is not one of the exclusive grounds provided in Minn. R. Crim. P. 26.02, subd. 5."

This court has also rejected an attempt to rely on an implied-bias challenge based on circumstances not listed in rule 26.02. In *State v. Anderson*, 603 N.W.2d 354, 355 (Minn. App. 1999), *review denied* (Minn. Mar. 14, 2000), a defendant in a burglary prosecution argued that it was error not to exclude jurors who had been victims of theft or

burglary. We phrased the issue as whether to expand rule 26.02 to include the "doctrine of implied bias, under which bias is presumed as a matter of law from the potential for substantial emotional involvement inherent in certain situations." We refused to expand the rule, stating that "without a clear indication from the Minnesota Supreme Court, this court is reluctant to adopt into its established jurisprudence a new doctrine that would have such a profound effect on current practice." *Id.* at 357. And we noted that the task of extending existing law does not fall to this court. *Id.*

Finally, the supreme court recently stated in *Williams v. State* that "Minnesota has not adopted the theory of implied bias." 764 N.W.2d 21, 28 (Minn. 2009).

We conclude that rule 26.02 continues to provide "the exclusive grounds to challenge for implied bias," *see Stufflebean*, 329 N.W.2d at 318 (stating that rule 26.02 provides exclusive grounds), and reject appellant's attempt to rely on an implied-bias challenge based on circumstances not listed in the rule. Because Juror 42 was not subject to a for-cause challenge under rule 26.02, the district court did not err in denying appellant's for-cause challenge.

Prejudice

We also conclude that appellant was not prejudiced by the district court's ruling. Appellant argues that errors in jury selection are structural, require automatic reversal, and are not examined for prejudice. Alternatively, appellant argues that he was prejudiced because he lost a peremptory challenge when he was forced to exercise a peremptory challenge to remove Juror 42 when the district court denied his for-cause challenge. We disagree.

Minnesota has required that a defendant appealing denial of a for-cause challenge establish both error and prejudice from the error. *Stufflebean*, 329 N.W.2d at 317. The rule is typically attributed to the following language from *Stufflebean*: "In an appeal based on juror bias, an appellant must show that the challenged juror was subject to challenge for cause, that actual prejudice resulted from the failure to dismiss, and that appropriate objection was made by appellant." *Id.*

Some errors in jury selection are structural errors that require automatic reversal. In *State v. Logan*, 535 N.W.2d 320, 324 (Minn. 1995), the court noted that *Stufflebean* "suggested that in an appeal based on juror bias, the appellant must show not only that the challenged juror was subject to challenge for cause but also that actual prejudice resulted." In *Logan*, the court stated it was satisfied "on the record before [it]" that "actual prejudice did result . . . and that the defendant is, therefore, entitled to a new trial." 535 N.W.2d at 324. But the court discussed Supreme Court precedent that indicates that examination for prejudice is not appropriate where "it has been shown that those charged with bringing a defendant to judgment lack objectivity." *Id.* (citing *Vasquez v. Hillery*, 474 U.S. 254, 263-64, 106 S. Ct. 617, 623 (1986), which addresses racial discrimination in selection of a grand jury). In *Logan*, the supreme court agreed "that if the members of a petit jury are selected on improper criteria or if a biased juror is improperly allowed to sit," and the error is properly preserved for appeal, "the error has undermined the basic structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Id.* (quotation omitted). Since *Logan*, the supreme court has provided further guidance that allowing a biased juror to sit is a structural error

requiring reversal without examination of prejudice, stating that "impartiality of the adjudicator goes to the very integrity of the legal system," that "the bias of a single juror violates the defendant's right to a fair trial," and that a structural error occurs when a biased judge acts as a fact-finder. *Brown*, 732 N.W.2d at 630.

But erroneous denial of a for-cause challenge does not require automatic reversal when the biased juror does not actually sit because the juror was removed with a peremptory challenge. *Ross v. Oklahoma*, 487 U.S. 81, 85-86, 108 S. Ct. 2273, 2277 (1988). In *Ross*, to preserve error in the denial of a for-cause challenge to a juror, the defendant was forced to exercise a peremptory challenge to remove the juror. *Id.* at 89, 108 S. Ct. at 2279. The defendant argued that had he not been forced to use a peremptory challenge to remove the biased juror, "he could have removed another juror, including one who ultimately sat on the jury" and that "the composition of the jury panel might have changed significantly." *Id.* at 87, 108 S. Ct. at 2277-78. The Supreme Court agreed that the jury panel may have been altered and that a peremptory challenge was lost, but the Court explained that it had "long recognized that peremptory challenges are not of constitutional dimension" and described peremptory challenges as "a means to achieve the end of an impartial jury." *Id.* at 87-88, 108 S. Ct. at 2278. The Court concluded: "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88, 108 S. Ct. at 2278.

Following *Ross*, in *United States v. Martinez-Salazar*, the Supreme Court rejected the notion that a defendant, who exercises a peremptory challenge following denial of a

for-cause challenge, "loses" or is "forced" to use a peremptory challenge where use of a peremptory challenge is not required to preserve error in the for-cause ruling. 528 U.S. 304, 315-16, 120 S. Ct. 774, 781-82 (2000). The Supreme Court stated that where use of a peremptory challenge is not required to preserve error following denial of a for-cause challenge, a defendant has a choice: pursue a Sixth Amendment challenge on appeal or elect to use a peremptory challenge to remove a juror. *Id.* The Court stated that "[a] hard choice is not the same as no choice" and that in removing the juror at issue, the defendant "did not lose a peremptory challenge" but, rather, "used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." *Id.* Because the Minnesota Rules of Criminal Procedure do not require, and the Minnesota Supreme Court has not ruled, that a defendant must remove a juror with a peremptory challenge to preserve error in denial of a for-cause challenge to the juror, a defendant in Minnesota is not "forced" to use a peremptory challenge and does not "lose" a challenge by exercising it to remove a juror following denial of a for-cause challenge to the juror.

The Minnesota Supreme Court applied *Ross* in *Barlow*, 541 N.W.2d at 311, and rejected an argument that a defendant was prejudiced from denial of a for-cause challenge where the juror at issue was removed with a peremptory challenge. In *Barlow*, the defendant argued that the trial judge "prejudicially impaired the exercise of his peremptory challenges by erroneously denying six challenges for cause, thereby causing defendant to exhaust his peremptory challenges." *Id.* at 310. The state conceded that denial of one of the for-cause challenges may have been in error. *Id.* at 311. The

supreme court began its analysis by citing *Ross* and noting that none of the jurors challenged for cause actually sat on the jury that tried the defendant. *Id.* The court then noted that under the *Stufflebean* rule, the defendant must "demonstrate the existence of actual bias or prejudice and a challenge for cause on completion of the voir dire." *Id.* at 312. The court stated that it had "consistently adhered to the rule established in *Stufflebean*" and said, "we again confirm that rule." *Id.* The *Barlow* court concluded that even if there was error in refusal of a for-cause challenge, "the error was cured by exercise of the peremptory challenge." *Id. Barlow* demonstrates that Minnesota follows *Ross* and that in Minnesota, there is no prejudice from denial of a for-cause challenge where the juror is removed with a peremptory challenge and the jury that sits is not biased.

Appellant relies on a Florida Supreme Court case for his argument that he was prejudiced by using a peremptory challenge, *Hill v. State*, 477 So. 2d 553 (Fla. 1985). *Hill* stated that Florida follows the rule that "it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." 477 So. 2d at 556. Appellant's reliance on *Hill* is unpersuasive as *Barlow* demonstrates that a different rule is followed in Minnesota. Under *Barlow*, there was no prejudice in this case because Juror 42 did not sit and appellant makes no other argument that the jury that sat was biased.

Affirmed.