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VOIR DIRE EXAMINATION – CHALLENGES FOR CAUSE AND ABUSE OF DISCRETION

State v. Holliman[1]

Defendant allegedly assaulted his wife and returned the same evening and set fire to her apartment house. As she watched the building burn, he took a shot at her. Officer Summers, who was standing nearby, pursued the defendant. The two men disappeared behind a neighboring building. Several shots were heard and later the officer was found dead. He had been killed by a bullet from a .22 calibre rifle owned by the defendant and in his possession when taken into custody.[2]

During the voir dire examination, prior to the defendant's trial on charges of first-degree murder and arson, it was revealed that one of the veniremen knew the slain officer and was a friend of his father. In addition, the venireman had a son who was a policeman assigned to the same district as Officer Summers and with whom he had briefly discussed the incident. The prosecutor asked the prospective juror whether these factors would affect his ability to give the defendant a fair trial. The venireman replied that he did not see why they should.[3] Defense counsel moved that the prospective juror be excluded for cause. While recognizing that the venireman "might not make a good juror," the judge stated that he could only be governed by the venireman's answers to the voir dire questions. Because the venireman had indicated that he would be fair, the challenge for cause was denied. The defendant then used one of his peremptory challenges to strike the prospective juror. On appeal, the St. Louis District of the Missouri Court of Appeals reversed the trial court's ruling and granted a new trial.[4]

Both the United States and Missouri constitutions guarantee the criminal defendant the right to a public trial by an impartial jury.[5] The purpose of the voir dire examination is to obtain jurors who can fairly decide the case under the evidence presented. It affords counsel an opportunity to determine whether each venireman is qualified to be a juror while at the same time establishing a basis for effective exercise of peremptory challenges.[6]

In criminal cases Missouri statutes provide for the exclusion of prospective jurors who are related to a party or the prosecutor,[7] who are opposed to the death penalty in capital cases,[8] who are witnesses in the

1. 529 S.W.2d 932 (Mo. App., D. St. L. 1975).
2. *Id.* at 935-36.
3. *Id.* at 937-38.
4. *Id.* at 938.
5. U.S. CONST. amend. VI; Mo. CONST. art. I, § 18 (a).
6. *See* Brill, *Examination of Jurors,* 29 Mo. L. REV. 259 (1964); Rosenwald, *Exemption from Jury Service and Challenges for Cause in Missouri,* 15 ST. LOUIS L. REV. 230 (1930); Field, *Voir Dire Examination--A Neglected Art,* 33 U.M.K.C.L. REV. 171, 172-73 (1965).
7. § 546.120, RSMo 1969.
8. § 546.130, RSMo 1969.

case,[9] and who have formed an opinion on any material fact to be tried.[10] These statutorily enumerated disqualifications are not exhaustive, however.[11] Anytime a venireman is shown to be biased he may properly be challenged and excused for cause.[12] In ruling on challenges for cause, the trial judge is given broad discretion.[13] Nevertheless, in the exercise of this discretion, it would be prudent to resolve a substantial doubt as to a venireman's competency against him.[14] It is the court's duty to excuse any juror whose sitting is reasonably likely to fill either party with an apprehension of unfairness.[15]

The early Missouri decisions suggested that a trial judge should not be found to have abused his discretion where there is any evidence to support his decision.[16] The more recent cases hold, however, that while great deference should be paid to the trial judge's ruling, it is not conclusive and will be overturned for a manifest abuse of discretion.[17] The general standard of review adopted by the Supreme Court of Missouri provides that a trial judge's ruling on a challenge for cause should not be disturbed on appeal except in three situations. If it can be shown that there is some fact which, in and of itself, necessarily shows prejudice, that the juror's demeanor disclosed prejudice, or that there was an admission of prejudice, the trial court will be found to have abused its discretion.[18] All doubts are to be resolved in favor of the finding of the trial court.[19]

The rationale underlying this broad grant of discretion is the trial judge's unique opportunity to observe the preliminary examination. Narrow appellate review is predicated on the trial judge's responsibility to consider carefully the responses of the prospective juror in order that a *factual determination* may be made as to whether he would be a fair and impartial juror.[20] The decision of the trial judge should be based on facts stated by the venireman, not on conclusions of the prospective juror himself as to his ability to act impartially.[21]

9. § 546.140, RSMo 1969.
10. § 546.150, RSMo 1969. *See* § 494.190, RSMo 1969 concerning challenges for cause in civil cases.
11. State v. DeClue, 400 S.W.2d 50, 56 (Mo. 1966).
12. Kendall v. Prudential Ins. Co., 319 S.W.2d 1, 5 (K.C. Mo. App. 1958), *rev'd on other grounds*, 327 S.W.2d 174 (Mo. En Banc 1959).
13. State v. Cuckovich, 485 S.W.2d 16, 22 (Mo. En Banc 1972).
14. Moss v. Mindlin's, Inc., 301 S.W.2d 761, 771 (Mo. 1957).
15. Glasgow v. Metropolitan St. Ry., 191 Mo. 347, 356, 89 S.W. 915, 917 (1905).
16. Parlon v. Wells, 322 Mo. 1001, 17 S.W.2d 528 (1929); State *ex rel.* Goldsoll v. Chatham, 80 Mo. 626, 632 (1883).
17. State v. Cuckovich, 485 S.W.2d 16, 20 (Mo. En Banc 1972); State v. DeClue, 400 S.W.2d 50, 57 (Mo. 1966).
18. Moss v. Mindlin's, Inc., 301 S.W.2d 761, 771-72 (Mo. 1957).
19. State v. Wilson, 436 S.W.2d 633, 637 (Mo. 1969); State v. Cunningham, 100 Mo. 382, 12 S.W. 376 (1889).
20. State v. Harris, 425 S.W.2d 148, 155 (Mo. 1968); State v. Wraggs, 512 S.W.2d 257, 259 (Mo. App., D. St. L. 1974); Phoenix Assur. Co. v. Loetscher, 215 Ark. 23, 219 S.W.2d 629 (1949).
21. State v. Lovell, 506 S.W.2d 441, 444 (Mo. En Banc 1974); State v. White, 326 Mo. 1000, 1005, 34 S.W.2d 79, 81 (1930).

Challenges for cause have been denied in situations where the venireman stated that he would decide the case on the evidence presented and not be influenced by any other factor, even though he clearly appeared to be prejudiced.[22] However, it is well settled that a prospective juror is not the judge of his own qualifications.[23] Any conclusions which he reaches as to his own competence should be treated only as *evidence* and need not be accepted by the court.[24]

When the sole basis of the trial judge's ruling on a challenge for cause is the prospective juror's opinion concerning his competency rather than the required factual finding, it is the responsibility of the appellate court to examine carefully the challenged juror's qualifications.[25] A more searching consideration of the appropriateness of excluding the venireman is justified in these cases than in other instances of appellate review of the trial court's rulings on challenges for cause. Because a factual determination by the trial judge of the prospective juror's qualifications is the basis of narrow appellate review, the absence of such a determination justifies a proportionately broader investigation. The general standard of review gives way to closer scrutiny of the venireman's responses. If the total examination shows doubt whether the venireman could have accorded the defendant a fair trial, then the trial court's failure to excuse him constitutes reversible error.[26]

There is no clear line of demarcation as to when a challenge for cause should be sustained.[27] Ultimately, the propriety of the trial court's

22. State v. Harris, 425 S.W.2d 148 (Mo. 1968) (venireman thought that prior experiences in having his home burglarized might affect him in burglary trial but, in reply to judge's question, stated he could weigh the evidence and follow instructions. Held: challenge for cause properly overruled); State v. Square, 257 La. 743, 244 So. 2d 200 (1971) (venireman had past associations with Ku Klux Klan, was friendly with victim's brother, and recognized that not guilty verdict would hurt that friendship, but said he would be impartial in trial of black man. Affirmed denial of challenge for cause). *But see* State v. Lovell, 506 S.W.2d 441 (Mo. En Banc 1974) (venireman stated that defendant should have greater burden than the one imposed by the standard of reasonable doubt but, in reply to leading questions by court, said he could be fair. Held: challenge for cause improperly overruled. Three judges dissented). If the venireman expresses reluctance to serve he undoubtedly should be excused. Winters v. Hassenbusch, 89 S.W.2d 546 (K.C. Mo. App. 1936) (friend of victim expressing reluctance to serve properly excused); State v. Faulkner, 185 Mo. 673, 84 S.W. 967 (1904) (friend of relative of defendant said such friendship would influence him—properly excused). *See* Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

23. State v. White, 326 Mo. 1000, 1005, 34 S.W.2d 79, 81 (1930).

24. Theobald v. St. Louis Transit Co., 191 Mo. 395, 418, 90 S.W. 354, 359 (1905). The United States Supreme Court stated in Irvin v. Dowd, 366 U.S. 717 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.

366 U.S. at 728.

25. 529 S.W.2d at 937.

26. State v. Lovell, 506 S.W.2d 441, 444 (Mo. En Banc 1974).

27. State v. DeClue, 400 S.W.2d 50, 57 (Mo. 1966).

ruling will depend on the circumstances of the particular case.[28] If the facts point to the possible existence of bias, the court should cautiously consider whether the venireman's sitting might endanger the defendant's right to an impartial body of jurors. In *Holliman,* each factor affecting the venireman's qualifications standing alone may not have been enough to excuse him for cause.[29] There are Missouri decisions holding that mere affiliation or connection with law enforcement is not enough reason to sustain a challenge for cause.[30] Likewise, acquaintance with an interested party may be insufficient in itself to require exclusion.[31] However, the existence of both of these factors, combined with the fact that the venireman briefly discussed the incident with his son, was found by the *Holliman* court to be "fraught with potential prejudice."[32]

The *Holliman* court indicated that the venireman should have been removed even if the trial judge had not acknowledged possible bias and had not revealed that his decision was based solely on the prospective juror's conclusion. The court of appeals found that the prospective juror's "preconceptions and underlying attitudes" would have influenced him despite his avowed ability to be impartial, thus implying that the circumstances in and of themselves showed prejudice.[33] *Holliman* suggested that even if the trial judge makes the required factual determination of competency, there are circumstances in which the appellate court will find as a matter of law that the venireman should have been excused for cause. Where the prospective juror is likely to have deep impressions which may close his mind to the law and the evidence, he should not be allowed to serve as a juror.[34]

Once it is found that an improper ruling was made on a challenge for cause, a new trial will not necessarily be granted. There is substantial authority in some jurisdictions that a party cannot complain if the unqualified venireman did not sit in the case and the challenger did not exhaust his peremptory challenges.[35] Some courts go one step further and place the burden on the challenging party to show that because he used a peremptory challenge on an incompetent venireman, an objectionable juror was allowed to serve.[36] The definition of an "objectionable" juror

28. State v. Harris, 425 S.W.2d 148, 155 (Mo. 1968).
29. 529 S.W.2d at 943 (Simeone, P. J., concurring).
30. State v. Cashman, 485 S.W.2d 431, 434 (Mo. 1972); State v. Wraggs, 512 S.W.2d 257, 258 (Mo. App., D. St. L. 1974).
31. Grimm v. Gargis, 303 S.W.2d 43, 49-50 (Mo. 1957).
32. 529 S.W.2d at 940.
33. *Id.* at 942.
34. Golden v. Chipman, 536 S.W.2d 761 (Mo. App., D. St. L. 1976).
35. Harper v. Adams, 166 So. 2d 824 (Fla. App. 1964); Mellinger v. Prudential Ins. Co., 322 Mich. 596, 34 N.W.2d 450 (1948); Harding v. Harding, 185 So. 2d 452 (Miss. 1966); Cox v. Sarkeys, 304 P.2d 979 (Okla. 1956); State v. Bethune, 86 S.C. 143, 67 S.E. 466 (1910); State v. Chealey, 100 Utah 423, 116 P.2d 377 (1941).
36. Arkansas State Highway Comm'n v. Dalrymple, 480 S.W.2d 955 (Ark. 1972); State v. Springer, 172 Kan. 239, 239 P.2d 944 (1952); Bufford v. State,

under this view, ranges from one who would have been peremptorily challenged[37] to one who was unsuccessfully challenged for cause.[38] Moreover, a few courts have refused to allow the challenging party to complain about an erroneous denial of a challenge for cause unless he shows that some juror who heard the case was legally unqualified to serve on the jury.[39]

Missouri has adopted the position that a criminal defendant is entitled to a full panel of qualified veniremen *before* he is required to make his peremptory challenges.[40] Under this view, the fact that the challenged juror did not serve on the jury because he was peremptorily challenged does not render the failure to sustain the challenge for cause harmless error. The Missouri legislature has provided each party with a fixed number of peremptory challenges[41] which may be exercised without showing any cause. The use of the peremptory challenge is a part of the process of obtaining a fair and impartial jury.[42] If a party is forced to use a peremptory challenge on a venireman who should have been excused for cause and exhausts his peremptory challenges,[43] he has been deprived of a peremptory which he might have used to strike a qualified juror. The *Holliman* decision properly follows the Missouri view that when a challenge for cause is erroneously denied requiring the challenging party to utilize one of his peremptory challenges to remove an unqualified juror, the error is prejudicial and a new trial must be granted.

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148 Neb. 38, 26 N.W.2d 383 (1947); Johnson v. State, 108 Tex. Crim. 499, 1 S.W.2d 896 (1927).

37. Rickett v. Hayes, 511 S.W.2d 187, 190 (Ark. 1974); Los Angeles & S.L.R. Co. v. Umbaugh, 61 Nev. 214, 123 P.2d 224 (1942).

38. *See* State v. Springer, 172 Kan. 239, 239 P.2d 944 (1952).

39. Grasham v. Southern Ry., 111 Ga. App. 158, 141 S.E.2d 189 (1965); Mahon v. State, 127 Tenn. 535, 156 S.W. 458 (1912).

40. 529 S.W.2d at 942; State v. Lovell, 506 S.W.2d 441 (Mo. En Banc 1974); State v. Foley, 144 Mo. 600, 46 S.W. 733 (1898); Dowdy v. Commonwealth, 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314 (1852).

41. § 546.180, RSMo 1969.

42. State v. Thomas, 530 S.W.2d 265, 267 (Mo. App., D. St. L. 1975).

43. Two Missouri decisions have noted authority for the rule that a party cannot complain of an erroneous denial of a challenge for cause if it did not force him to exhaust his peremptory challenges. Neither case was decided on that basis however. Kendall v. Prudential Ins. Co., 327 S.W.2d 174 (Mo. En Banc 1959); Pratt v. Schrieber, 213 Mo. App. 268, 249 S.W. 449 (K.C. Mo. App. 1923). The rule was followed in the old Missouri case of Eckert v. St. Louis Transfer Co., 2 Mo. App. 36, 43 (1876). However, in Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S.W. 354 (1905), the supreme court found it improper to mix questions concerning challenges for cause with whether all peremptory challenges have been exhausted. This case was followed recently in Butler v. Talge, 516 S.W.2d 824 (Mo. App., D.K.C. 1974), where the court of appeals held that a party who fails to exhaust his peremptory challenges is nevertheless entitled to attack the propriety of a ruling on a challenge for cause. Because section 546.200 RSMo 1969, requires the trial judge to exclude all but the first 12 unchallenged jurors, the defendant's failure to exercise one of his peremptories will result in the exclusion of the thirteenth juror on the list by the judge. The defendant might as well strike another juror and avoid the risk that the authorities cited in *Kendall* and *Pratt* might be adopted in Missouri.

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