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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0742

DA 17-0742

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 180

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JEREMY WILLIAM BLOCK,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADC 15-391
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, James Reavis, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Jeffrey M. Doud, Assistant Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Susan L. Weber, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: June 12, 2019

Decided: August 6, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Jeremy William Block (Block) appeals his conviction of two counts of incest, in violation of § 45-5-507, MCA, following jury trial in the Eighth Judicial District Court, Cascade County. We affirm, and consider the following issue:

> *Did the District Court abuse its discretion by denying Block's for-cause challenge of a prospective juror during voir dire?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On August 10, 2015, Block was charged with two counts of felony incest due to repeated sexual contact with his stepdaughter, K.O. K.O. was born in 1997 and is the daughter of Larah and Zach. Larah and Zach divorced in 2005 before K.O. turned nine. In May 2009, Larah met Block, when Block was 34 years old and K.O. was 11. In July or August 2009, Block moved into Larah's home, and the two were married in January 2010. When K.O. was 13 or 14 years old, Block began making sexual advances toward her and provided her with his prescription medications and alcohol. When K.O. was 14, Block raped her, and continued to sexually abuse her until she was 17. This abuse was so frequent that K.O. could not estimate the number of times it occurred. K.O. eventually became addicted to opioids and alcohol as a result of Block providing them to her. During this period of abuse, K.O. became very distanced from Zach and ceased visiting or communicating with him for years. K.O. testified that Block told her Zach and Larah did not care about K.O. and wanted nothing to do with her. K.O. moved in with her grandparents around April 2015, when she was 17, and told them that Block had been sexually abusing her, leading to the filing of charges.

¶3 Block pled not guilty to the incest charges and his case proceeded to trial on August 21, 2017. During voir dire, the prospective jurors were asked whether they knew the victim or any of her family members. Juror Stewart responded that he knew Zach, resulting in the following colloquy:

> Juror Stewart: Zach []. If it's the same one that I'm thinking of, I—I know Zach [], but I don't know if it's the same one. Because if it is—their family is in—out in the audience here, and I knew him, you know. If it's the same Zach []. She's nodding it is. So I know them in the audience. I've known him since he was little, first born.
>
> The State: Okay. What effect do you think that might have if he comes in and testifies for the State, you know?
>
> Juror Stewart: I think I could be honest. But I just—I wasn't sure. I had to stop and think Zach []. And it is the same one I know.
>
> The State: How do you know him?
>
> Juror Stewart: I know his parents. And we've been friends for a long time. He grew up with my kids. They were born—you know, my kids and him, they were born at the same time. We did a lot of stuff together, you know, as families, church and camping, and all that kind of stuff so—
>
> The State: Well, do you really think you can be fair? I mean—
>
> Juror Stewart: With his parents and stuff, and watching, I don't know. It would be kind of hard, I think. I mean, just because of the relationship that we've had for quite a while.
>
> The State: Right. And that's what we're trying to find out here, so we can deal with this up front, and not have to find out half-way through the trial. And—
>
> Juror Stewart: Right.
>
> The State: And I have a problem. So, I mean, it's—it's your call. You tell us. Can you be fair? Can you be fair to the Defendant if testimony comes in against him through [Zach]?

Juror Stewart: I don't think I really could because the relationship we've had in the past. Especially—I don't know, family sitting out—and having interaction with his family afterwards. I don't know.

The court: I'm not—I'm not really following the line of questions. This is a fact witness who's going to be testifying. He's not talking about that he knows the Defendant; right? You don't know the Defendant, do you?

Juror Stewart: No. I know the witness, Zach. I know the witness.

The court: So he's a fact witness. I don't know the nature of what his testimony is going to be. The issue becomes, because you know him, would you give his testimony greater weight than another witness's testimony just because you know him?

Juror Stewart: Putting it that way, no. I would be okay. I wouldn't give him more weight than—

The court: Would you give it less weight?

Juror Stewart: No, putting it that way.

The court: So this fact witness who's going to testify that you know, is your familiarity with him, or your relationship with him, going to in any way affect your ability to consider the evidence, to hear the evidence, to listen to my instructions, and render a verdict? I'm just not sure how your knowledge of him would make you biased to one party or the other in this particular case.

Juror Stewart: I think I could be fair, but I'm just letting you know that that's how I know him. And I did know his parents very well and stuff, so I'm just letting you know. Okay.

¶4 Block's counsel then had the opportunity to question the prospective jurors, including Juror Stewart, resulting in the following colloquy:

Defense counsel: Mr. Stewart, I need to ask you some questions. How are you doing today?

Juror Stewart: Fine.

Defense counsel: Okay. Earlier today, much earlier today, you said that you actually knew Zachary []?

Juror Stewart: Yes.

Defense counsel: And how long have you known him?

Juror Stewart: Well, I've lost track of him. I knew him probably from 30 years ago, plus, because that's when our—his parents and my wife, we had our children together, and we went to church together. We went camping together. So—but I have not probably seen him for—maybe not recognize him if I saw him, you know, for, oh, a good 20 years or so. But—

Defense counsel: So can I assume then that you have not met his daughter?

Juror Stewart: No, I have not.

Defense counsel: And have you heard anything at all about this case?

Juror Stewart: No, I have not.

Defense counsel: Do you have opinions as to [Zach] that you are bringing here to this courthouse today?

Juror Stewart: No. It's been so long that, no.

Defense counsel: All right. And if you were a defendant, would you want somebody on the jury that knew the witnesses?

Juror Stewart: I guess it would depend on how long they have been apart. But I don't know if I would or not. That might be kind of iffy for me.

Defense counsel: Okay. Now, if you were—if you were the defendant, would you want yourself as a juror?

Juror Stewart: Boy, in this case, I think I could because it has been so long, you know, and that I have even seen him, or whatever. But it might—it might influence if I knew, you know, that the other person was—that knew me—and was going to be, you know, making a decision on my future.

¶5 Following this exchange, Block moved to dismiss Juror Stewart from the jury for cause. The State objected, arguing Juror Stewart testified that he and Zach had no contact for approximately 20 years, he hadn't met K.O., and he thought he could be fair and impartial. The District Court denied Block's for-cause challenge of Juror Stewart on the basis that the standard for removal under § 46-16-115, MCA, had not been met. Block used a preemptory challenge to remove Juror Stewart and exhausted all additional preemptory challenges. At the conclusion of the trial, the jury convicted Block on both counts of incest.

¶6 Block appeals.

STANDARD OF REVIEW

¶7 "We review district court denials of challenges of prospective jurors for cause for an abuse of discretion." *State v. Johnson*, 2019 MT 68, ¶ 7, 395 Mont. 169, 437 P.3d 147. "In the context of challenges for cause, a court abuses its discretion if it fails to excuse a prospective juror whose actual bias is discovered during voir dire." *State v. Heath*, 2004 MT 58, ¶ 7, 320 Mont. 211, 89 P.3d 947. If a defendant subsequently uses a peremptory challenge to strike a prospective juror who was challenged for cause, and ultimately exhausts all afforded peremptory challenges, "the erroneous denial of a challenge of a prospective juror for cause is a structural error requiring automatic reversal." *Johnson*, ¶ 7.

DISCUSSION

¶8 Block contends that the District Court abused its discretion by denying his challenge for cause, arguing Juror Stewart's responses during voir dire demonstrated he could not act "with entire impartiality in this case" because he knew one of the witnesses.

¶9 "A criminal defendant's fundamental right to an impartial jury is guaranteed by the United States and Montana Constitutions." *State v. Russell*, 2018 MT 26, ¶ 12, 390 Mont. 253, 411 P.3d 1260; U.S. Const. amend. VI; Mont. Const. art. II, § 24; *State v. Allen*, 2010 MT 214, ¶ 25, 357 Mont. 495, 241 P.3d 1045; *State v. Hausauer*, 2006 MT 336, ¶ 20, 335 Mont. 137, 149 P.3d 895; *Johnson*, ¶ 9. Accordingly, a defendant may challenge a prospective juror for cause if the juror demonstrates a "state of mind" regarding the case or either party "that would prevent the juror from acting with entire impartiality" concerning the parties and material matters in the case. Section 46-16-115(2)(j), MCA; *Johnson*, ¶ 9. "In determining whether to grant a challenge for cause, the court must examine both the statutory language and the totality of the circumstances." *State v. Taylor*, 2009 MT 161, ¶ 20, 350 Mont. 447, 208 P.3d 422. The dispositive question is "whether the totality of the juror's statements and referenced circumstances raise a serious question or doubt about his or her willingness or ability to set aside any such matter to fairly and impartially render a verdict based solely on the evidence presented and instructions given." *Johnson*, ¶ 11. Accordingly, a district court must "determine whether a serious question exists about a prospective juror's ability to be fair and impartial based on the totality of the juror's statements and referenced circumstances[,]" *Johnson*, ¶ 11, and we defer to the

court's determination regarding a challenge for cause. *State v. Johnson*, 2014 MT 11, ¶ 20, 373 Mont. 330, 317 P.3d 164 (hereinafter *Johnson 2014*); *State v. Robinson*, 2008 MT 34, ¶ 13, 341 Mont. 300, 177 P.3d 488 (*overruled in part on other grounds by State v. Gunderson*, 2010 MT 166, ¶ 50, 357 Mont. 142, 237 P.3d 74) ("[T]he decision whether to grant a challenge for cause is within the discretion of the trial judge, who has the ability to look into the eyes of the juror in question, and to consider her responses in the context of the courtroom[.]"); *State v. Hatten*, 1999 MT 298, ¶ 28, 297 Mont. 127, 991 P.2d 939 ("Because the trial court is best able to observe the jurors and to decide the potential for prejudice when allegations of juror misconduct are raised, the trial court has significant latitude when ruling on such matters.").

¶10 Once a defendant has challenged a prospective juror for cause, doubt or ambiguity regarding a juror's ability to be fair and impartial should be resolved in favor of disqualification. *Johnson*, ¶ 11. However, preconceived biases or opinions, common experiences, specialized interest or knowledge, and initial expressions or concern about inability to be fair and impartial will not necessarily disqualify a juror. *See Johnson*, ¶ 10 (citing *Johnson 2014*, ¶¶ 14-20 (bias in favor of law enforcement); *Allen*, ¶¶ 26-30 (preconceived opinion of guilt based on law enforcement bias and pretrial publicity); *State v. Braunreiter*, 2008 MT 197, ¶¶ 12-17, 344 Mont. 59, 185 P.3d 1024 (preconceived opinion that defendant must prove innocence); *State v. Falls Down*, 2003 MT 300, ¶¶ 24-36, 318 Mont. 219, 79 P.3d 797 (preconceived opinion of guilt based on pretrial publicity); *Russell*, ¶¶ 13-19 (common experience due to DUI-related death and injury of

family members and resulting discomfort in sitting on that type of case); *State v. Normandy*, 2008 MT 437, ¶¶ 23-25, 347 Mont. 505, 198 P.3d 834 (initial concern about ability to be fair based on disdain for domestic violence and how it adversely affected juror's wife in her first marriage); *State v. Rogers*, 2007 MT 227, ¶¶ 25-26, 339 Mont. 132, 168 P.3d 669 (initial statement of disdain for child molesters and inability to be objective)). Accordingly, we have held that "if the prospective juror simply expresses concern about impartiality but believes he can fairly weigh the evidence, the court is not required to remove the juror." *Russell*, ¶ 13 (internal quotations and citation omitted). Instead, we recognize that "[i]n reality, few people are entirely impartial regarding criminal matters. . . ." *Russell*, ¶ 13 (internal quotations and citation omitted).

¶11 Here, we conclude the totality of Juror Stewart's statements and referenced circumstances show that no serious question existed about his ability to be fair and impartial. Rather, Juror Stewart initially expressed concern about his ability to be fair and impartial, but ultimately stated he believed that he could be, and pledged to try. *Contra State v. DeVore*, 1998 MT 340, ¶ 24, 292 Mont. 325, 972 P.2d 816 (*overruled in part by State v. Good*, 2002 MT 59, ¶ 63, 309 Mont. 113, 43 P.3d 948) (finding prospective jurors' adherence to the belief that the defendant was "guilty of something" demonstrated a serious question about their ability to remain impartial and properly afford the presumption of innocence to the defendant); *Good*, ¶¶ 12, 53 (finding prospective jurors' adherence to their predisposition to favor the testimony of a teenage victim of sexual abuse demonstrated a serious question about their ability to be impartial). In response to the State's question

about what effect Juror Stewart's relationship with Zach would have on his ability to sit as a juror, Juror Stewart stated, "I think I could be honest. But I just—I wasn't sure. I had to stop and think Zach []. And it is the same one I know." Similarly, after Block's counsel asked whether Juror Stewart would want himself on this particular jury if he were the defendant instead of Block, Juror Stewart stated, "Boy, in this case, I think I could because it has been so long, you know, and that I have even seen him, or whatever." These statements demonstrate Juror Stewart's confidence that he would be fair and impartial in this case. Additionally, Juror Stewart explained that he had "lost track of him" and would "maybe not recognize him if [he] saw him" because they had not been in contact for approximately 20 years, indicating his relationship with Zach was remote in time.

¶12 Block also argues that Juror Stewart's answers to the basic questions of whether he could be fair and impartial "were initial, spontaneous statements" that weighed in favor of Juror Stewart's dismissal. When considering a prospective juror's ability to be fair and impartial, more weight is given to a juror's "spontaneous and unprompted responses to open-ended questions" because these are "generally the most truthful, accurate, and reliable indicators of bias and the ability to be fair and impartial," in contrast to "single-syllable answers prompted by leading questions." *Johnson*, ¶ 11. Accordingly, a comment from a prospective juror that casts doubt on his or her ability to be fair and impartial may be followed by open-ended questions from counsel or the court "to further investigate, clarify, or confirm whether a serious question exists about the juror's bias or ability to be fair and impartial[;]" *Johnson*, ¶ 12, but loaded questions or coaxed recantations from counsel or

the court in an attempt to rehabilitate the prospective juror are inappropriate. *Johnson*, ¶ 12.

¶13 In *Johnson*, our most recent case considering this issue, we reversed where a prospective juror twice spontaneously asserted emphatically that she would have a "hard time" and a personal "problem" with requiring the State to prove an essential element of the charged offense, and the State followed with "a series of leading and loaded questions which squarely put the prospective juror in the position of either having to acquiesce to those questions or state her intent to defy the court and the law." *Johnson*, ¶¶ 14, 16. After the State coaxed the prospective juror, she recanted. *Johnson*, ¶ 16. We determined that this was a "clear, if not quintessential, case of a prospective juror clearly and unequivocally manifesting a serious question as to whether she could be fair and impartial, followed by a recantation improperly coaxed by leading and loaded questions that would otherwise have required the juror to defy the court and the law." *Johnson*, ¶ 16.

¶14 To the extent that Juror Stewart conveyed initial concerns about being fair and impartial, these comments were made in direct response to the State's question regarding whether any of the prospective jurors knew any of the witnesses in the case, unlike the juror in *Johnson*. There, the juror commented that she would find the defendant guilty because he was a "bad man" in light of the charge, rather than because the State proved that he committed the crime, followed by later spontaneously reiterating her previously stated problem with requiring the State to prove one of the required elements of the charge, stating that, "I do have a problem with the partner aspect of it all." *Johnson*, ¶ 4. Here,

Juror Stewart was merely responding to the question asked, which led to additional questioning by counsel and the court, in order to gauge Juror Stewart's ability to be fair and impartial. This further questioning led to Juror Stewart's conclusion that he would not weigh Zach's testimony more or less than any other witness, and that he believed he could be fair and impartial in this case. Thus, the totality of the circumstances, including Juror Stewart's responses to open-ended questions indicated his ability to be fair and impartial.

¶15 Block also asserts the District Court erred by attempting to rehabilitate Juror Stewart. "District courts may question jurors in order to clarify a potential bias, but neither the court nor counsel should elicit coaxed recantations in order to rehabilitate a potential juror." *State v. Hart*, 2009 MT 268, ¶ 13, 352 Mont. 92, 214 P.3d 1273 (internal quotations and citation omitted). Here, the District Court intervened in the questioning, stating, "I'm not—I'm not really following the line of questions. This is a fact witness who's going to be testifying. He's not talking about that he knows the Defendant; right? You don't know the Defendant, do you?" After Juror Stewart answered that he did not know Block, but only "the witness, Zach," the court asked if Stewart would give Zach's testimony any more or less weight than another witness's testimony, or be influenced in his ability to consider the evidence, listen to the court's instructions, and render a verdict because they knew each other, commenting, "I'm just not sure how your knowledge of him would make you biased to one party or the other in this particular case."

¶16 Unfortunately, in its intervention, the court incorrectly minimized the nature of Stewart's relationship and his potential bias. Zach was more than a simple fact witness;

rather, he was the natural father of the alleged incest victim and a son in a family that in past years had been active friends with Stewart. Stewart's expressed concerns were proper subjects of inquiry. In response to the court's questioning, Stewart stated, "I think I could be fair, but I'm just letting you know that that's how I know him. And I did know his parents very well and stuff, so I'm just letting you know. Okay." Despite the misstep, we do not conclude from the record that the District Court inappropriately coaxed Stewart into "recantations in order to rehabilitate" him. *Hart*, ¶ 13 (internal quotation omitted). Rehabilitation was unnecessary, as Stewart stated he thought he could be fair, and was merely being forthright about his past relationship with the victim's family. *Contra State v. Williams*, 262 Mont. 530, 535-36, 866 P.2d 1099, 1102-03 (1993) (*overruled in part by Good*, ¶ 63) (finding the court's attempt to rehabilitate a juror by asking, "'[y]ou're not telling the court that you would disregard that instruction if I gave it to you, would you?'" was "at best, unpersuasive, and at worst, threatening"); *Good*, ¶¶ 48, 53 (reversing where a juror recanted only after the court's attempt to rehabilitate her included the question "[d]o you quarrel with my little civics speech?" which demonstrated a serious question about the juror's ability to act impartially). Thus, we disagree with Block's argument regarding the District Court's asserted impermissible "coaxed recantation."

¶17 In our view, the totality of Juror Stewart's statements demonstrate he displayed an initial concern about his ability to be impartial, but after being questioned directly as to whether he could fairly weigh the evidence at trial, he affirmatively stated that he could

without impermissible coaxing. Thus, we conclude the District Court did not abuse its discretion in denying the challenge for cause. *See Russell*, ¶ 13.

¶18 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR