

5-24-2018

Sayedzada v. State, 134 Nev. Adv. Op. 38 (May 24, 2018)

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Recommended Citation

Schreiber, Sara, "Sayedzada v. State, 134 Nev. Adv. Op. 38 (May 24, 2018)" (2018). *Nevada Supreme Court Summaries*. 1153.
<http://scholars.law.unlv.edu/nvscs/1153>

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CRIMINAL PROCEDURE: RIGHT TO CHALLENGE JUROR'S PRESENCE ON APPEAL

Summary

The Court held that a party waives the right challenge a juror's presence on appeal when the argument is based on facts known during voir dire; the party consciously made the decision to not pursue, or abandoned, a challenge for cause; and the party accepted the juror's presence on the jury. The Court then examined the issue of juror bias, and explained the differences between actual, implied, and inferable bias.

Background

Sayedbashe Sayedzada ("Sayedzada") was confronted by a security guard who noticed that he was hiding something under his shirt. Sayedzada subsequently attacked the guard, which prompted the guard to bring Sayedzada under control and call the police. It was discovered that Sayedzada had a purse, which he claimed to have found, hung around his neck. In total, thirteen credit cards were recovered from inside the purse, as well as scattered on the ground, that belonged to a woman and her family members. Police then contacted the purse's owner who advised that she did not know that her purse had been stolen from her vehicle. Accordingly, the State charged Sayedzada with thirteen counts of possession of a credit card or debit card without the cardholder's consent, to which he entered a plea of not guilty.

During voir dire, Sayedzada challenged prospective jurors 7, 29, 37, and 38 for cause. Prior to making its ruling, the district court allowed a traverse of the challenged jurors. Following each side's questioning of the prospective jurors, Sayedzada renewed his challenges to prospective jurors 29 and 38, but he did not make any further challenges as to prospective jurors 7 and 37. The district court denied Sayedzada's two challenges for cause without explanation so Sayedzada used his peremptory challenges to exclude prospective jurors 29 and 38, however, prospective jurors 7 and 37 were empaneled without further objection. Following the trial, the jury convicted Sayedzada on all charges.

Discussion

Sayedzada argued his trial was prejudiced and warranted reversal because prospective jurors 7 and 37 were empaneled after the district court denied his challenges for cause, and he also argued that the district court abused its discretion when it denied his challenges for cause regarding prospective jurors 29 and 38.

Waiver of right to challenge jurors 7 and 37 on appeal

Sayedzada contended that the jury was not fair and impartial because it included prospective jurors 7 and 37, who he had objected to for cause. He claimed that the jurors were biased as evidenced by their answers elicited during voir dire. Though Sayedzada conceded that he failed to renew his challenges to these jurors after they were traversed as to bias, he argued that

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this was irrelevant. He cited *Blake v. State*, which he interpreted to require the Court to reverse the verdict if any biased juror is empaneled regardless of whether the party challenged the juror for cause.²

The Court found Sayedzada's argument to be misplaced because his interpretation of *Blake* was too broad. The Court in *Blake* held that regardless of whether the district court abused its discretion, the error was not reversible where the defendant did not show, "that any juror actually empaneled was unfair or biased."³ The appellant in *Blake* preserved his argument for appeal by challenging the juror below.⁴ Therefore, *Blake* is in accordance with the general rule in Nevada that states that if the empaneled jury is impartial, then erroneously failing to strike a juror for cause is not a reversible error.⁵

Accordingly, the issue before the Court was whether a defendant may waive subsequent challenges to the seating of a juror if the record indicates that the defendant was aware of particular facts below, the defendant consciously did not pursue, or abandoned, a challenge for cause based on such facts, and the defendant accepted the fact that the juror was empaneled on the jury. Under these circumstances the Court held that a defendant waives the right to challenge the seating of the juror.⁶ The Court has cited and recognized both *State v. Anderson* and *State v. Hartley* when considering whether a defendant can waive the right to raise a challenge to juror bias on appeal.

In *Anderson*, a juror stated during voir dire that, "he had formed and expressed an unqualified opinion as to the guilt or innocence of the prisoner, but subsequently had modified that opinion."⁷ Defense did not challenge the juror for bias below.⁸ When Anderson subsequently appealed, the Court concluded that he could not raise this objection because if a defendant accepts a juror without objection, even if the defendant knows that the prospective juror has formed and expressed an unqualified opinion, then he cannot raise this objection after the verdict.⁹

In *Hartley*, several jurors stated during voir dire that they had formed, "an unqualified opinion as to the guilt or innocence of [Hartley]."¹⁰ On appeal, Hartley argued that even though he did not object to these jurors, they should have been disqualified.¹¹ The Court looked to both the common law as well as the statute, and determined that a party could waive an objection to a juror if the reason for the challenge was known at the time, and that a party did waive it unless the challenge was taken prior to the jury being empaneled.¹² Additionally, the Court stated under such circumstances, the defendant cannot argue that he has not been tried by a "constitutional jury" following the jury's verdict.¹³

Most recently, the Court addressed the issue of waiver in *McCall v. State*, where defense counsel was alerted to the fact that a juror was a citizen of British Columbia from her juror

² *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005).

³ *Id.*

⁴ *Id.* at 795–96.

⁵ *See, e.g.*, *Preciado v. State*, 130 Nev. 40, 44 (2014); *Weber v. State*, 121 Nev. 554, 581 (2005); *Farmer v. State*, 405 P.3d 114 (2017).

⁶ *See McCall v. State*, 97 Nev. 514, 516 (1981); *State v. Hartley*, 22 Nev. 342, 357 (1895); *State v. Anderson*, 4 Nev. 265, 279 (1868).

⁷ *Anderson*, 4 Nev. at 279.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Hartley*, 22 Nev. at 354.

¹¹ *Id.* at 354–55.

¹² *Id.* at 355–56.

¹³ *Id.* at 357.

questionnaire.¹⁴ Though there was no objection at the time of voir dire, the defendant moved for a mistrial when he discovered that the juror was not an American citizen.¹⁵ However, the Court found that the defendant waived his right to challenge this claim when he failed to object during voir dire.¹⁶

The Court found that the underlying policy of the waiver rule is sound because it prevents parties from strategically placing questionable jurors on the jury in order to lay the foundation for reversal in the event of an unfavorable verdict. The Court reiterated that a party waives the right to challenge a juror's presence on appeal when the argument is based on facts known during voir dire; the party consciously made the decision to not pursue, or abandoned, a challenge for cause; and the party accepted the juror's presence on the jury. In order for the waiver rule to apply, the record must clearly show that the party was aware of the applicable facts and consciously made the decision to approve the juror, and when the record does not show this, then a challenge to the seating of a juror may be reviewed for plain error.

Here, Sayedzada knew during voir dire about the facts that he argued demonstrated that jurors 7 and 37 were biased, which is evidenced by the fact that he had initially attempted to challenge those jurors for cause. However, following the traverse of the jurors, he did not renew his challenges. Sayedzada also bypassed additional opportunities to challenge the jurors on the facts that he raised on appeal. The first opportunity was when he reasserted his challenge for cause following the traverse of prospective jurors 29 and 38, and the second was when he asserted that he did not have any challenges after the district court explicitly asked if either party had any further challenges. Following these two instances, Sayedzada accepted the jury panel. Thus, Sayedzada relinquished his objections to these jurors, and accepted their presence on the jury. The Court concluded that Sayedzada waived his right to make an appellate argument regarding the jurors' bias, and that he had not been denied a fair and impartial jury due to the presence of these jurors.

For-cause challenges to prospective jurors 29 and 38

Sayedzada argued that the district court abused its discretion when it denied his for-cause challenges for jurors 29 and 38. He claimed that both jurors were biased because each had experienced events similar to that of the victim.

A party may challenge a prospective juror for any cause that would prevent the juror from considering the facts fairly.¹⁷ The trial judge determines whether the juror is qualified. Accordingly, the Court gives deference to the trial court's decision. When the Court is reviewing whether the juror demonstrated bias it must consider the juror's cumulative statements. The Court has repeatedly held that district courts must strike for cause any juror who, during voir dire, demonstrates that his or her views would prevent or impair him or her from being impartial and applying the law. Even when the juror promises impartiality, bias may still arise from the juror's background or experiences. In *United States v. Torres*, the Court of Appeals for the Second Circuit defined three types of bias, actual, implied, and inferable, as grounds for dismissing a juror for cause.¹⁸

¹⁴ McCall, 97 Nev. at 515–16.

¹⁵ *Id.* at 516.

¹⁶ *Id.*

¹⁷ NEV. REV. STAT. § 175.036(1) (2015).

¹⁸ *United States v. Torres*, 128 F.3d 38, 43–48 (2d Cir. 1997).

Actual bias is when a juror demonstrates a state of mind that prevents the juror from being impartial, such as when the juror admits to partiality or the juror's voir dire answers indicate bias.¹⁹ It is determined through adequate questioning by the court regarding the juror's ability to apply the law impartially.²⁰ The court has broad discretion in determining whether a juror's answers indicate actual bias.

Implied bias is when the juror's background and/or the juror's relationship to the parties or case may indicate bias.²¹ It is independent of actual bias.²² Under common law, implied bias exists only in nine specific circumstances,²³ and the Nevada Legislature has codified elements of implied bias in the civil context.²⁴ However, the Legislature has not codified what constitutes implied bias in the criminal context. Since the facts in this case did not rise to the level of implied bias, the Court did not define it here.

Inferable bias arises when a juror discloses a fact that indicates that he or she is at risk of partiality.²⁵ It must be sufficient enough to grant the trial judge discretion to excuse the juror for cause, but not rise to the level of a mandatory presumption of bias.²⁶ Inferable bias is similar to actual bias in that it arises from facts uncovered during voir dire, but it is different in that it does not rely on the juror to admit bias or require the judge to evaluate the juror's credibility.²⁷ It is similar to implied bias in that it does not rely on the juror's assertion of impartiality, but it is distinct in that the facts that are disclosed do not require the juror's excusal for cause.²⁸ Mandatory disqualification arises when a juror is actually or impliedly biased, however inferable bias allows a judge to exercise his or her discretion to determine whether the facts indicate that the juror would be unable to consider the case objectively.²⁹

Prospective juror 29

Prospective juror 29 made statements during voir dire that troubled the Court. She stated that she had been the victim of credit card theft on several occasions, and that she was the victim of a vehicle burglary where her purse and valuables were stolen. Additionally, she expressed multiple times that she did not think she could be impartial in this case due to her own experiences. Prospective juror 29 claimed after further questioning that her experiences did not affect her view of the criminal justice system. She then stated that she was able to be fair and impartial. However, she backtracked these statements. Prospective juror 29 also advised that she believed a truly innocent defendant would want to personally state his or her case, and that a criminal defense attorney's job is to get his or her client out of trouble.

The Court concluded that the district court abused its discretion by denying Sayedzada's for-cause challenge for prospective juror 29 because the facts show that she demonstrated actual bias. Prospective juror 29 explicitly and repeatedly stated that she did not believe she could be

¹⁹ *Id.* at 43–44.

²⁰ *Id.* at 44.

²¹ *Id.* at 45.

²² *Id.*

²³ NEV. GEN. STAT. § 4220 (1861).

²⁴ NEV. REV. STAT. § 16.050 (2015).

²⁵ Torres, 128 F.3d at 47.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

impartial. She also belittled Sayedzada's constitutional right not to testify, as well as the defense attorney's role in the case. Further, she did not offer any statements that countered her previous assertions. Thus, prospective juror 29's statements as a whole indicated that her bias would have prevented or substantially impaired her ability to apply the law and the district court's instructions.

The Court determined that even if there was no actual bias, these facts would have supported a determination and subsequent dismissal due to inferable bias. Prospective juror 29 also indicated that these experiences made her angry, and that her experiences could influence her views towards the defendant. This showed that she was unable to separate her personal experiences from the case. Therefore, because an average person in prospective juror 29's position would not be able to decide the matter objectively, the district court would have been within its discretion to infer bias and strike prospective juror 29.

The Court held that even though the district court should have granted the challenge for cause, its error in denying the challenge did not immediately constitute grounds for reversal because the defendant must still demonstrate that he exhausted all of his peremptory challenges and that the empaneled jury was unfair or biased. The Court concluded that the error was harmless because Sayedzada removed both prospective jurors 29 and 38 by peremptory challenge. Further, since the Court found that Sayedzada waived his arguments that jurors 7 and 37 were biased, and there are no other empaneled jurors that he argued were biased, then there was nothing to indicate that the jury was not fair and impartial. The Court concluded that no relief was warranted.

Prospective juror 38

The Court held that the district court did not abuse its discretion when it denied Sayedzada's for-cause challenge to prospective juror 38 because she did not express more than a possibility of bias arising from her experiences. Prospective juror 38 stated that she did not believe her experiences would affect her ability to be fair and impartial. Though, her bank account and credit card information had been stolen, these experiences were different from the victim's experiences in this case. Thus, the record did not indicate that prospective juror 38 was biased in a way that would prevent her from applying the law or following the court's instructions.

Conclusion

The district court must dismiss biased jurors for cause in order to ensure that a defendant has a fair and impartial jury. However, a party waives the right to challenge a juror's presence on appeal when the argument is based on facts known during voir dire; the party consciously made the decision to not pursue, or abandoned, a challenge for cause; and the party accepted the juror's presence on the jury. Here, the Court concluded that Sayedzada waived his challenges for jurors 7 and 37.

The district court must excuse a juror for cause for actual and implied bias, and may excuse a juror for inferable bias. Failure to excuse a biased prospective juror rises to a reversible error only if there is an erroneous denial of the challenge for cause that results in an unfair empaneled jury. Although the district court abused its discretion when it failed to strike for cause a prospective juror who demonstrated actual and inferable bias, the Court found that this error did not warrant reversal. Accordingly, the Court affirmed Sayedzada's conviction.