TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

- against - :

RAUL ALVAREZ, :

Defendant-Appellant. :

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PRELIMINARY STATEMENT

Appellant Raul Alvarez appeals from a judgment of the Supreme Court, Kings County, rendered October 5, 2016, convicting him, after a jury trial, of burglary in the third degree [P.L. § 140.20], criminal trespass in the third degree [P.L. § 140.10], criminal mischief in the third degree [P.L. § 145.05], attempted petit larceny [P.L. §§ 110.00, 155.25], criminal possession of a controlled substance in the seventh degree [P.L. § 220.03], and unlawful possession of marijuana [P.L. § 221.05], and imposing concurrent sentences for an aggregate term of 3 ½ to 7 years in prison (Sciarrino, Jr, J., at trial and sentencing).

Timely notice of appeal was filed and, on January 12, 2017, this Court granted appellant leave to proceed as a poor person and assigned Lynn W. L. Fahey, since succeeded by Paul Skip Laisure, as counsel on appeal.

No stay has been sought and appellant is at liberty. Appellant had no co-defendants below.

QUESTION PRESENTED

> Did the trial court deprive appellant of his due process rights to a fair trial and an impartial jury when it denied defense counsel's for-cause challenges to three prospective jurors who admitted they would tend to believe police officers as they were more likely to tell the truth even though they gave no unequivocal assurances to the contrary?

STATEMENT OF FACTS

Introduction

Appellant Raul Alvarez was charged with commercial burglary and related crimes in connection with a break-in at a construction site that resulted in a broken glass door; no property was stolen. During jury selection, defense counsel elicited that several prospective jurors believed that police officers were more likely to tell the truth than other witnesses. Although the court never obtained an unequivocal assurance of impartiality from three prospective jurors defense counsel challenged for cause, the court denied those challenges.

Jury Selection

During the first challenge conference, defense counsel challenged four prospective jurors for cause on the ground that each would tend to find police witnesses more likely

to be honest: Delilah O., Sean A., Edward M., and Clinton D. (130-32; see 51, 53).[1] During voir dire, defense counsel had elicited from Sean A. that he felt "the police would be more likely to tell the truth than not" (119). And when counsel asked three jurors together, "Mr. M[], Mr. D[], Ms. O[], you would give more credibility to a police officer than another witness?" one of them said yes and the others did not respond (120). He had also elicited from another prospective juror, Phillp L., that he had a "[s]light bias. I tend to believe police officers more, but I do understand that there's a small percentage that lies" (119).

At the end of defense counsel's voir dire, the Court asked Phillip L. whether he could treat police officers like any other witness with respect to credibility, and Phillip L. said "no" (121-22). The Court then addressed the other prospective jurors:

> THE COURT: Can the rest of the jury promise to evaluate the testimony of all of the police officers or any of the police officers that take the stand without any bias for or against them and to treat them like every other witness that takes the stand? Can everyone promise me that?
>
> PROSPECTIVE JURORS: Yes.
>
> THE COURT: Can anyone not make that promise? Okay. And that would be that you would believe that they're lying or that they're always telling the truth?
>
> PROSPECTIVE JUROR: Neither of those, but I have —
>
> THE COURT: We all come to life with certain beliefs and

[1] Unprefixed numbers in parentheses refer to the pages of the trial transcript.

> prejudices, some of the good, some of them bad. What I need is a promise, and if you can't make it, that's fine, we would rather know, that you can evaluate in this case these officers impartially and not be bias[ed] as to the witnesses in this case as to whether of not they're telling the truth, not telling the truth and you'll make that independent evaluation. Can you do that or not?
>
> PROSPECTIVE JUROR: I can promise to try to do it.
>
> THE COURT: I got to go back to Yoda.
>
> PROSPECTIVE JUROR: I mean, I feel as though I have some innate prejudice in favor of testimony from law enforcement.
>
> THE COURT: Irrespective of that innate bias toward law enforcement, do you feel that you could not in any way, shape or form in this case hold the officers that will testify here without that bias. In other words, can you put aside that bias for this case and promise to be fair and impartial in this case? Once the case is over, you can go back to whatever biases you have.
>
> PROSPECTIVE JUROR: Yes.
>
> THE COURT: Anybody else? Okay (122-23).

The court dismissed Phillip L. for cause by consent of both parties (127). Defense counsel sought to remove Delilah O. for cause because "she indicated that she would be bias[ed] in favor of police testimony" (130). The prosecutor recalled that Delilah O. "although initially, like several jurors, said she may tend to believe the officer more, when directed by the Court, she was clear that she would be able to put that aside and be fair to the defendant and fair to the People" (130). The Court denied defense counsel's for-

cause challenge (130).

Defense counsel lodged a for-cause challenge as to Sean A. for the same reason: "he said he would be bias[ed] in favor of the police" (131). When the prosecutor said he could not recall Sean A. saying that, the Court interrupted to say "[h]e said more likely to tell the truth, but he then promised to follow the Court's instructions" (132). The prosecutor then said he did recall that Sean A. had "said he would follow instructions, treat every witness equally" (132). The Court denied the for-cause challenge (132).

Next, defense counsel challenged Edward M. for cause for the same reason, "clearly stating that he would be bias[ed] in terms of believing [police] testimony" (132). The prosecutor responded, "Judge, in the end, the Court did clarify . . . he would be able to put aside his personal views and be impartial" (132). The Court agreed that "[h]e did make such a promise unequivocally at the end," and denied the for-cause challenge (132-33).

Finally, defense counsel challenged Clinton D. for cause because he "also indicated that he would be more likely to believe police officers" (133). The prosecutor responded "the same record was made," and the Court denied the challenge (133).

Defense counsel exercised peremptory challenges to Delilah O. (131), Edward M. (132) and Sean A. (133), but not Clinton D. (134). Defense counsel exhausted his ten peremptory challenges (244).

The Trial

The People's Case

IHOR NEMY, owner of a construction company called R & I Restoration, and custodian of the building under construction at 330 Bleecker Street in Brooklyn, arrived there on the morning of September 1, 2014, to find that the chain on the gate of the construction fence had been broken and the glass door to the building lobby, which he valued at $1,500 to replace, shattered (32, 39-40, 57-58). Inside the lobby, two locked tool lockers were undisturbed but a pick-ax was leaning up against the back of one of them (40). Someone from the company called the police and none of the workers entered the building; they waited for the police to enter first (40).

Detective WILLIAM REED went to the scene the following day, and one of the workers showed him surveillance videos of the burglary (84, 85). The man in the video was wearing a key lanyard, a gold chain, and a distinctive black shirt bearing the picture of a dog; he was also wearing gloves (P. Exh. 2A, 2C; P.O. NATHALIE REYES, 244).[2] He obtained a copy and made still photographs from it, which he gave to the media for publication (87).

Upon receiving a telephone call from Mr. Alvarez's ex-girlfriend, he obtained a photograph of Mr. Alvarez, but was unable to arrest him until the ex-girlfriend called again with Mr. Alvarez's current whereabouts and a description of the car he was driving (92, 93). Detective Reed went to that location and found Mr. Alvarez standing next to

[2] No DNA was recovered from the pick-ax (NUBIA DUCASSE, 183).

a car matching the description (94). Mr. Alvarez was wearing a lanyard, a gold chain, and a black shirt that matched the one worn by the man in the video (96, 114). He had buprenorphine pills and marijuana in his pocket (96; JACQUELINE McMILLIAN, 204, 207).

ARGUMENT

THE TRIAL COURT DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHTS TO A FAIR TRIAL AND AN IMPARTIAL JURY WHEN, WITHOUT CONDUCTING ANY FOLLOW-UP INQUIRY, IT DENIED DEFENSE COUNSEL'S FOR-CAUSE CHALLENGES TO THREE PROSPECTIVE JURORS WHO ADMITTED THEY WOULD TEND TO BELIEVE POLICE OFFICERS AS THEY WERE MORE LIKELY TO TELL THE TRUTH.

During voir dire, prospective jurors Delilah O., Edward M., and Sean A., all said they believed that police officers were "more likely" than other witnesses to testify truthfully, evincing clear bias in favor of police testimony. The trial court denied counsel's for-cause challenge of each of those prospective jurors on the ground that its subsequent general questioning of them and other jurors elicited unequivocal assurances of impartiality. Because such general group questioning cannot elicit the assurance necessary to deny a for-cause challenge of a biased prospective juror, the court deprived appellant of his constitutional and statutory rights to due process and an impartial jury. U.S. Const., Amends. V, VI, XIV; N.Y. Const., Art. 1, §§ 2, 6; C.P.L. §270.20(1)(b), (2). As counsel exercised a peremptory challenge to remove each of the three prospective jurors and exhausted his challenges, this Court must reverse Mr. Alvarez's conviction and

order a new trial.

"Nothing is more basic to the criminal process than the right of the accused to a trial by an impartial jury." People v. Branch, 46 N.Y.2d 645, 652 (1979); see People v. Arnold, 96 N.Y.2d 358, 362 (2001). To secure that right, C.P.L. § 270.20(1)(b) provides that a party may challenge a prospective juror for cause if he "'has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial.'" Arnold, 96 N.Y.2d at 362 (quoting C.P.L. §270.20(1)(b)).

Thus, when a prospective juror's statements cast doubt on her ability to deliberate fairly and impartially, the court must grant a for-cause challenge unless it elicits from the juror an unequivocal assurance that she can set aside any bias, accept the law, and render an impartial verdict based solely on the trial evidence. See People v. Harris, 19 N.Y.3d 679, 685-86 (2012); People v. Johnson, 17 N.Y.3d 752, 753 (2011); People v. Chambers, 97 N.Y.2d 417, 419 (2002); Arnold, 96 N.Y.2d at 362; People v. Johnson, 94 N.Y.2d 600, 614 (2000).

The trial court must ultimately consider the challenged juror's voir dire responses in their entirety in evaluating whether she has made the requisite unequivocal declaration of impartiality. See People v. Torpey, 63 N.Y.2d 361, 368 (1984); People v. Blyden, 55 N.Y.2d 73, 78 (1982). Those responses, construed as a whole, must demonstrate an "absolute belief that his opinion will not influence his verdict." People v. Culhane, 33 N.Y.2d 90, 107 (1973).

For-cause challenges must be granted as to prospective jurors who, in light of their own predisposition, experience, or background, are predisposed to credit police testimony. See People v. Nicholas, 98 N.Y.2d 749, 751-52 (2002) (error to deny for-cause challenge when prospective jurors acknowledged a "tendency to believe a police officer's account just because he or she is a police officer"); Johnson, 94 N.Y.2d at 615 (same, when prospective juror admitted she would "tend to favor" police over civilian testimony).

Here, in light of the likelihood that several law enforcement witnesses were going to testify, defense counsel asked several prospective jurors whether they believed that "the police would be more likely to tell the truth than not" (119, 120). Sean A. said that he did (199). Similarly, when defense counsel asked Edward M., Clinton D., and Delilah O., whether "you would give more credibility to a police officer than another witness" one said "yes" and the others did not disagree. Each of these prospective jurors, therefore, had reported that they would be more likely to believe that a police witness was telling the truth than an ordinary witness and, therefore, were actually biased in favor of police testimony. See Nicholas, 98 N.Y.2d at 750-52; Johnson, 94 N.Y.2d at 615; People v. Lewis, 71 A.D.3d 1582 (4th Dept. 2010) (error to deny for-cause challenge when juror said she would lean toward believing a police officer over a civilian).

None of the three prospective jurors at issue in this case ever provided an unequivocal assurance that he or she could be impartial. To satisfy its obligations under

C.P.L. §270.20(1)(b) and the interpreting case law, the trial court must obtain more than group silence in response to expressed bias: it must obtain "unequivocal assurances of impartiality from each [juror]." Nicholas, 98 N.Y. 2d at 752 (reversing conviction where court inquired of the panel collectively whether they agreed police testimony should be ac-corded same weight as other testimony, and where the record indicated there was "no response" [emphasis supplied]). Here, the Court asked Phillip L. whether he could treat police officers like any other witness (121-22). When Phillip L. said "no," the court addressed the rest of the panel generally, asking all of them whether they could promise to do that (122). The "prospective jurors" answered "yes" (122). When the court further inquired whether "anyone [can]not make that promise," so that "you would believe that they're lying or that they're always telling the truth," one unnamed juror tried to answer but the court interrupted with an explanation that everyone has biases but that the court needed a "promise" that "you can evaluate in this case these officers impartially" (122-23). The best that juror could do was say "I can promise to try to do it" (123). The court pressed that juror by asking whether he or she could "put aside that bias for this case and promise to be fair and impartial" and the juror said "yes" (123). The court then said "Anybody else? Okay" (123).

The court's colloquy established only that one unidentified prospective juror made a promise to be impartial. Given his or her earlier "I can promise to try," qualification, the overall inquiry did not support the conclusion that this was an unequivocal assurance.

See People v. Torpey, 63 N.Y.2d 361, 368 (1984) (court must consider the challenged juror's voir dire responses in their entirety in evaluating whether she has made the requisite unequivocal declaration of impartiality). The unidentified juror's responses, construed as a whole, did not demonstrate an "absolute belief that h[er] opinion will not influence h[er] verdict." Culhane, 33 N.Y.2d at 107. But even if they did, and even assuming that this juror was one of the three prospective jurors defense counsel tried to strike for cause, rather than Phillip L., that still left two biased jurors who gave no specific unequivocal assurance of impartiality.

As the Court noted in Arnold, 96 N.Y. 2d at 363-64,

> A group answer by the entire panel did not address [the juror's] personal attitudes, nor did it force her to confront the crucial question whether she could be fair to this defendant in light of her expressed disposition. Indeed, nothing less than a personal, unequivocal assurance of impartiality can cure a juror's prior indication that she is predisposed against a particular defendant or a particular type of case.

See also People v. Bludson, 97 N.Y. 2d 644, 646 (2001) (jury panel's earlier collective acknowledgment that they would follow the court's instructions did not amount to an unequivocal expression of individual juror's promise to do the same). The court in this case did not elicit any such unequivocal personal assurance of impartiality. Thus, the court erred in denying counsel's challenges to Delilah O., Edward M., or Sean A. for cause. See Harris, 19 N.Y.3d at 685-86; Johnson, 17 N.Y.3d at 753; Nicholas, 98 N.Y.2d at 752.

In addressing the instant challenge, the court below would have done well to heed the message articulated by the Court of Appeals in Culhane, 33 N.Y.2d 90, reiterated in Branch, 46 N.Y.2d 645, and reinforced by Blyden, 55 N.Y.2d at 78 (internal citations ommitted):

> [T]he trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service. Even if through such caution, the court errs and removes an impartial juror, the worst the court will have done . . . is to have replaced one impartial juror with another impartial juror.

By failing to grant the defense challenges to prospective jurors Delilah O., Edward M., and Sean A., whose faith in the credibility of police testimony was clearly communicated during the selection process, the court improperly transgressed "the bounds of discretion." Blyden, 55 N.Y.2d at 78.

Because defense counsel used three peremptory challenges to remove Delilah O., Edward M., and Sean A., (131, 132, 133), and exhausted all of his peremptory challenges (244), he satisfied the statutory exhaustion requirements of C.P.L. § 270.20(2) and fully preserved the issue for appeal. See Harris, 19 N.Y.3d at 685-86; Culhane, 33 N.Y.2d at 97. This Court should therefore reverse appellant's conviction and remand for a new trial. People v. Wright, 30 N.Y.3d 933, 934 (2017).

CONCLUSION

BECAUSE THE COURT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL BY REFUSING TO GRANT HIS CHALLENGES OF PROSPECTIVE JURORS FOR CAUSE, THIS COURT MUST REVERSE HIS CONVICTION AND ORDER A NEW TRIAL.

Respectfully submitted,

PAUL SKIP LAISURE
Attorney for Defendant-Appellant

November 2, 2018

PRINTING SPECIFICATIONS STATEMENT
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

- against - :

RAUL ALVAREZ, :

Defendant-Appellant. :

----------x

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 3590/15.
2. The full names of the original parties were the People of the State of New York against Raul Alvarez. There has been no change of parties on appeal.
3. This action was commenced in the Supreme Court, Kings County.
4. The action was commenced by the filing of an indictment.
5. This appeal is from a judgment convicting appellant, after a jury trial, of criminal burglary in the third degree.
6. This is an appeal from a judgment of a conviction rendered October 5, 2016.
7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.