

FILED

June 28, 2000

Maynard, Chief Justice, dissenting: DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

June 30, 2000

DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
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I dissent because I do not believe that the trial court abused its discretion in failing to strike juror Denmon for cause. Accordingly, I would not have reversed the appellant's conviction based on this failure.¹

As noted by the majority, "[t]he relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant." Syllabus Point 4, in part, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996). Stated differently, the inquiry is whether juror Denmon admitted on his voir dire that he had formed an opinion of the guilt or innocence of the accused. See Syllabus Point 4, *State v. Johnson*, 49 W.Va. 684, 39 S.E. 665 (1901). The trial transcript does not indicate that juror Denmon had formed a fixed opinion. Rather, juror Denmon was unable to say that he could not presume the defendant to be innocent at the trial's outset. He disclosed that his friends' alcohol-related deaths would probably enter his mind during deliberations, and admitted that it would be difficult to render a fair, impartial, and unbiased verdict. Notably, however, he intimated that he would have to see all the evidence before making up his mind.

¹The appellant also claimed that the trial court erred in failing to strike for cause juror Melko. The majority does not address this issue.

If I had been the trial judge, I would have sustained the motion to strike juror Denmon for cause. However, this is not the test used by this Court. Instead, we are to ask whether the trial court *abused its discretion* in failing to strike a juror. Because juror Denmon did not express a fixed opinion as to the guilt of the appellant, I must conclude that the trial court did not abuse its discretion. Accordingly, I dissent.