RENDERED: NOVEMBER 25, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001818-MR

ROBERT MORRISON — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 14-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Robert Morrison (Morrison) brings this appeal from the Hickman Circuit Court's final judgment imposing the jury's recommended sentence of fifteen years' imprisonment for the crimes of escape in the second degree, fleeing and evading in the second degree and being a persistent felony offender in the first degree. Having reviewed the record and applicable law, we affirm.

I. Facts

Voir dire and the jury trial were held on September 15, 2014. During the Commonwealth's comments and questions to the venire, Juror Estelle Morris (Juror Morris) notified the court that she was the mother of the Hickman County Attorney, Sue Ellen Morris (Attorney Morris). Attorney Morris conducted the preliminary hearing on Morrison's charges but had no further involvement in the case after the preliminary hearing. She would not be called as a witness during the Morrison trial and she would not be assisting the Commonwealth in the prosecution.

Juror Morris was questioned by the trial judge as to her knowledge of the defendant, her knowledge and feelings of bias in the case (due to her relationship to her daughter) and her discussion of the case with Attorney Morris. Juror Morris responded that she didn't believe she held any bias related to the defendant, that her daughter never discussed cases with her, and that she, Juror Morris, had no prior knowledge of the case at bar. Morrison moved to strike Juror Morris for cause, arguing, essentially, the potential lack of impartiality and implied bias of Juror Morris because of the mother-daughter relationship. Morrison stated he would not object to having her remain as a reserve panelist, if needed. After questioning Juror Morris, the trial judge stated he was satisfied with her answers, found her qualified to serve, and thus, overruling Morrison's motion to strike and allowing Juror Morris to remain part of the voir dire panel. Morrison used a peremptory strike on Juror Morris. Additionally, Morrison noted on his sheet that

he would have struck another person, Juror Melissa Garrett, if he had not used one of his peremptory strikes on Juror Morris. Melissa Garrett was ultimately selected to serve on the Morrison petit jury.

At the end of the Commonwealth's voir dire presentation, two panelists informed the court that they could not hear certain voir dire comments or questions. The trial court provided both of them with headphones to assist with their ability to hear, but the trial court did not conduct an inquiry on which, if any, Commonwealth questions and comments those panelists did or did not hear. Morrison did not move to strike either person from the panel and the issue was not preserved.

II. Issues and Analysis

Morrison's appeal centers on two allegations of error within the voir dire process. First, Morrison alleges the trial court abused its discretion by failing to strike Juror Morris from the voir dire panel for cause once the court ascertained she was the mother of Attorney Morris. Second, Morrison alleges the court committed palpable error by failing to question two panelists who were provided headphones after notifying the court that they had difficulty hearing the Commonwealth's questions. Morrison argues the court should have questioned those members as to what questions they may have missed before letting them stay on the panel.

(A)Juror Morris

A trial court's denial of a motion to strike for cause is reviewed by this Court for a showing of an abuse of discretion. *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997) (*overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011)). The measure of whether a juror should have been stricken by the lower court is "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Kentucky Rules of Criminal Procedure (RCr) 9.36(1).

The issue concerning Juror Morris centers on whether the existence of the mother-daughter relationship, in and of itself, means the juror should have been stricken after the trial court conducted an evaluation and discovered that no juror bias or pretrial knowledge of the defendant or case existed. The Supreme Court held in *Gabbard v. Commonwealth,* 297 S.W.3d 844 (Ky. 2009), "[i]t is largely because of the familiarity both with what occurs during voir dire and the community that '[t]he law recognizes that the trial court is vested with broad discretion to determine whether a prospective juror should be excused for cause....'" *Id.* at 853 (citation omitted). In the instant matter, the record demonstrates that the trial court engaged Juror Morris in a short, but fair, round of questions for the purpose of determining if she could be an impartial juror. The trial court also engaged Morrison and the Commonwealth with several questions to find out Attorney Morris's level of connection to the Morrison case. The record reflects that Attorney Morris did not have any other involvement in the Morrison

case beyond the preliminary hearing and would not be participating in the felony trial. The purpose of a preliminary hearing is to determine whether there is sufficient evidence to justify detaining a defendant in jail or under bond until the grand jury has an opportunity to act on the charges. The ultimate goal is to protect the accused from detention on groundless charges. *Commonwealth v. Arnette*, 701 S.W.2d 407, 408 (Ky. 1985).

The trial court had the best vantage point by which to see any potential conflicts in having Juror Morris on the voir dire panel or the petit jury. We believe a trial court, like Hickman Circuit Court, has a knowledge and understanding of the nuances of the preliminary hearing process within its judicial circuit and has knowledge and familiarity with the County Attorney in charge of that process. And, when presented with a question of the potential for a juror's impartiality or bias, a trial court should use that knowledge and familiarity to conduct a fair evaluation and determine if, in consideration of the totality of the circumstances, the juror against whom an objection is made, possesses the "mental attitude of appropriate indifference" that is required for eligibility to sit on a jury. *Gabbard,* 297 S.W.3d at 854.

We disagree with Morrison's argument that the instant case can be compared to the voir dire events in *Sluss v. Commonwealth*, 450 S.W.3d 279 (Ky. 2014).[1] The *Sluss* voir dire panel was awash in issues concerning panelists with

[1] We acknowledge that the *Sluss* opinion was rendered on December 18, 2014, however, as discussed later in this Opinion, neither the holdings, nor dicta, contradict our decision in the present action.

pretrial knowledge of the allegations against the defendant and knowledge of the underlying accident and the subsequent social media discussions. Some panelists also had relationships with persons associated with the case in some manner. In *Sluss*, the Supreme Court encouraged trial courts to use their authority to enlarge jury panels or change venues to avoid imperiling cases with "miserly voir dire practices," thereby inhibiting the eventual rendition of fair and impartial verdicts. *Id*. at 285. We are not persuaded the Hickman Circuit Court violated the *Sluss* admonition or standard, or the equally strong standards for voir dire set out in the predecessor cases of *Gabbard* and *Shane v. Commonwealth*, 243 S.W. 3d 336 (Ky. 2013). In reviewing the facts of the Hickman Circuit Court's evaluation of Juror Morris measured against Attorney Morris's involvement in the preliminary hearing, we find the trial court did not abuse its discretion in overruling Morrison's motion to strike.

(II) Two Anonymous Jurors

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted). Palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). Palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination

that manifest injustice has resulted from the error. RCr 10.26. "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding ... to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

As to the second issue before the Court, Morrison alleges the trial court erred by failing to strike two voir dire panelists who stated they did not hear all of the Commonwealth's questions. He alleges that this failure equals palpable error as the court did not fulfill its duty to ensure an impartial jury consisting of jurors who are properly assessed for bias or prejudice. This issue was not preserved, but Morrison asks for palpable error review pursuant to RCr 10.26.

In their briefs with this Court, neither party provides the names of the jurors in question, nor do they indicate if those specific persons were selected for Morrison's petit jury. We have reviewed the trial court video of the voir dire proceedings, but it is not clear from the record which panelists were given the headphones. Morrison does not indicate if he had to use his peremptory strikes to eliminate those jurors.

Based on the limited facts provided by Morrison, we are not persuaded by the speculation that because the panelists may have missed certain questions means they would have provided answers that may have justified having the lower court strike them from the venire. The identity of those jurors is a crucial fact for review of whether the trial court erred by failing to strike those members. In *Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985), the Supreme Court

stated, "[w]e will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record. . . . [W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Id*. at 145 (citation omitted). We will not engage in "gratuitous speculation" in the present matter. As Morrison failed to name the panelists who are the center of the controversy and outline the ultimate fate of those jurors in relation to Morrison's trial, we cannot "plumb the depths of the proceeding" to properly evaluate whether the trial court violated his right to due process in the selection of an impartial jury. *Martin*, 207 S.W.3d at 4. Morrison has not demonstrated that the trial court's failure to eliminate these two jurors or inquire as to what they might have missed in questioning meets the standard of error that is "easily perceptible, plain, obvious and readily noticeable." *Brewer,* 206 S.W.3d at 349. We find we have no basis to conduct palpable error review of Morrison's allegation and, therefore, decline to reverse the trial court as to this issue.

For the foregoing reasons, the order and judgment of the Hickman Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shannon Dupree
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory A. Fuchs
Assistant Attorney General
Frankfort, Kentucky