

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-002049-MR

FRANK ROBERT SMITH

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 12-CR-00053-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Frank Robert Smith appeals from a Judgment of the Green Circuit Court reflecting a jury verdict finding him guilty on one count each of first-degree assault and tampering with physical evidence. Smith argues that the trial court denied him the right to present a defense by 1) failing to admit evidence that the victim was on probation, 2) failing to admit evidence that the victim previously

assaulted the victim's wife, and 3) improperly failing to strike a juror for cause.

We find no error and AFFIRM the Judgment on appeal.

In the early morning hours of May 23, 2012, Green County Sheriff Robbie Beard responded to a 911 call from a residence in Green County, Kentucky. Upon arriving at the scene, Beard observed Bryan Lobb lying in the front yard, with Brian Smith pacing around him. Lobb lived next door to the residence where he was found. He was covered in blood, and had multiple injuries including lacerations, a broken leg and a traumatic brain injury. Brian Smith was suffering from a knife wound in the abdomen that penetrated his colon. Brian Smith's brother, Frank Robert Smith ("Appellant"), was present at the scene, but stated that he had been inside the residence and did not know anything about the incident.

An investigation ensued, whereupon it was determined that a fight had occurred the preceding day between Appellant's mother and Lobb's wife. The matter escalated the following day. Testimony was later adduced that Appellant and Brian Smith walked next door to Lobb's residence and attacked Lobb with a steel pipe. Lobb stated that he stabbed Brian Smith in an attempt to defend himself. Lobb said that Appellant and Smith beat him for up to 40 minutes and then dragged him next door to the Smith residence. Bryan Lobb and Brian Smith were each hospitalized for several days and then released.

Sheriff Beard and Constable Billy Patterson investigated the incident and located a knife laying near the side of the Smith residence. Sheriff Beard also

located a place on the ground at the Lobb residence where it appeared that persons had been fighting. Beard observed blood at this spot and what appeared to be human flesh and blood on a trail leading towards the Smith residence. Sheriff Beard later executed a search warrant at the Smith residence, where he found a pair of bloody boots in the laundry room, a pair of bloody tennis shoes soaking in a washing machine, and a bloody axe handle, steel pipe and tee shirt.

The matter proceeded before the Green County grand jury, which indicted Appellant in July 2012, on one count each of first-degree assault and tampering with physical evidence. Appellant's brother, Brian Smith, was indicted on other charges. Appellant's indictment proceeded to trial in August 2014, which resulted in a guilty verdict on both counts. The jury recommended a sentence of 10 years in prison on the assault charge and one year for tampering with physical evidence, to be run concurrently for a total sentence of 10 years in prison. The court then rendered a Judgment in conformity with the jury's recommendation, and this appeal followed.

Appellant now argues that he was denied his right to present a defense. Specifically, he maintains that the trial court improperly suppressed evidence that Lobb was on probation at the time of the assault, that Lobb had pleaded guilty to assaulting his wife and a police officer, and that Lobb was facing a 10-year sentence if his probation was revoked. The focus of Appellant's argument on this issue is that Lobb had a motive to lie about the events occurring on May 23, 2012, because Lobb could have been returned to prison if he were

found to have violated his probation. Appellant argues that the jury received a one-sided view of Lobb's testimony, that Lobb's testimony was crucial to the Commonwealth's case, and that the jury was shown only a partial picture from the alleged victim who had a motivation to paint the Smith brothers as aggressors. Appellant contends that the court's failure to admit this evidence constituted reversible error because it denied him the right to present a full and fair defense of the charges against him. He seeks reversal of the Judgment on appeal and remand for further proceedings.

Kentucky Rule of Evidence ("KRE") 611(b) states in part that a "witness may be cross-examined on any matter relevant to any issue on the case, including credibility." "Witness credibility is always at issue, and relevant evidence which affects credibility should not be excluded." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). The corollary to this maxim, however, is that a trial court retains broad discretion over cross-examination. *Id.* Finally, a trial court's decision to limit the scope of cross-examination is reviewed on appeal for abuse of discretion. *Davenport v. Commonwealth*, 177 S.W.3d 763, 771 (Ky. 2005). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

The dispositive question for our consideration is whether the trial court's decision to limit the scope of cross-examination constituted an abuse of discretion. *Davenport, supra*. The parties have directed our attention to case law

supportive of their respective arguments. However, it is clear throughout the case law that there is no hard and fast rule addressing the admissibility of testimony relating to the alleged bias of witness testimony. Rather, the decision to allow or restrict the admission of such testimony is largely based on the facts of each case, and is guided in part by the speculative nature of claimed bias. *Davenport*, 177 S.W.3d at 769. In the instant matter, the jury was informed that Lobb was a convicted felon, that the arrest of his wife was possible motivation for retaliation against the Smith brothers, and that Lobb was in possession of a shotgun, shotgun shells and a knife at the time of the incident. Additionally, Lobb acknowledged stabbing Brian Smith during the incident. It cannot reasonably be argued that the jury was presented with an incomplete picture of Lobb's motivations and his role in the feud between the parties. Ultimately, however, as the record reasonably supports the trial court's exercise of discretion in refusing to allow questioning on Lobb's probationary status, and because abuse of that discretion has not been shown, we find no error.

Appellant goes on to argue that the trial court improperly failed to strike a juror for cause. During *voir dire*, Juror David Dicken stated that his son is a Kentucky state trooper. When first asked whether he could be impartial, Dicken responded that he would not be biased in favor of law enforcement and that he could be fair. Dicken stated that he would assume that whoever is on the witness stand is going to tell the truth.

However, upon further questioning by the trial judge, Dicken stated that it was possible he could be biased in favor of police officers, and that it was possible that a uniformed officer would have greater credibility. After more questioning, Dicken again stated that he could judge the evidence fairly and treat the testimony of a police officer just like that of everyone else.

Appellant, through counsel, moved to strike Dicken for cause. Upon considering the motion, the trial court determined that Dicken “made every effort to be honest” and that the court was convinced he would “give everybody equal scrutiny.” The court denied the motion to strike Dicken, and Appellant then used a peremptory challenge to strike him. Appellant’s counsel stated that she would have used that peremptory challenge on another juror had she been able to strike Dicken for cause. Appellant now argues that the court’s failure to strike Dicken constituted reversible error.

It is axiomatic that a criminal defendant is entitled to a fair and impartial jury. United States Constitution, 6th, 8th and 14th Amendments; Kentucky Constitution sections 2, 7 and 11. “When there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, the juror shall be excused as not qualified.” Kentucky Rule of Criminal Procedure (RCr) 9.36(1). A trial court abuses its discretion in ruling on a motion to strike for cause when it “seats a juror who is truly equivocal with regard to his or her ability to render an impartial judgment.” *McDaniel v. Commonwealth*, 341 S.W.3d 89, 94 (Ky. 2011).

Appellant directs our attention to *McDaniel, supra*, in support of his claim of error. In *McDaniel*, the Kentucky Supreme Court determined that the trial court erred in failing to strike two jurors for cause. The first juror had previously been employed with the decedent victim's wife and the second had worked directly with the victim. In each instance, the prospective juror could not state unequivocally that he or she could be unbiased. The Kentucky Supreme Court found that the defendant was entitled to strike these jurors for cause under this circumstance.

Conversely in the matter at bar, and as opposed to the jurors in *McDaniel*, Dicken had no direct or indirect association with the victim or the parties herein. Additionally, and unlike the *McDaniel* jurors, Dicken stated unequivocally that he would judge the evidence fairly and render an impartial judgment. While it is true that Dicken acknowledged that his son was a state trooper, and initially stated that he might find the testimony of a police officer more persuasive, the court was able to engage in further questioning to ascertain Dicken's state of mind and clarify if Dicken believed he could fairly consider all of the testimony. Given the totality of Dicken's responses, in conjunction with the court's ability to directly examine Dicken's demeanor and veracity, the court determined that Dicken would "give everybody equal scrutiny."

The decision of whether to strike a juror for cause rests in the sound discretion of the trial court. *McDaniel*, 341 S.W.3d at 92. Because Dicken stated without equivocation that he could consider the evidence fairly, and because a

“juror’s response to one question, even if it may on its own indicate bias, does not necessarily outweigh the remaining indicia of neutrality”, *Whittle v.*

Commonwealth, 352 S.W.3d 898, 901 (Ky. 2011), we cannot conclude that the Green Circuit Court abused its discretion in overruling Appellant’s motion to strike Dicken for cause. We find no error.

For the foregoing reasons, we AFFIRM the Judgment of the Green Circuit Court.

ALL CONCUR.

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