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RENDERED: MARCH 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000436-MR

TERRY LEON AYERS — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
NO. 10-CR-00166

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Terry Leon Ayers, appeals as a matter of right, pursuant to Ky. Const. § 110, from a judgment of the Daviess Circuit Court convicting him of burglary in the first degree, criminal attempt to commit rape in the first degree, and the status offense of persistent felony offender in the first degree, and sentencing him to life imprisonment. On appeal, Appellant raises the following claims of error: (1) the trial court erred by refusing to strike a juror for cause, and (2) the trial court denied Appellant's right to due process by failing to grant his motion for directed verdict. For the reasons set forth herein, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Becky McGee was asleep on her sofa in the apartment that she shared with her roommate, Kyle Brown. McGee awoke to the sound of someone trying

to open the door to her apartment. She called 911 for assistance, and during the call she threw her phone at the door and yelled, "Go away." The intruder, alleged to be Appellant, then yanked the door open. McGee testified that the intruder was African American, wore gloves, had an orange towel over his head, and held a crowbar. A struggle between McGee and Appellant ensued. McGee said that Appellant pushed her down onto the sofa and tried to suffocate her with a pillow. She testified that he pulled her pants down and said "Give me some of that." McGee pushed Appellant away, grabbed the crowbar, and struck her assailant on his forehead. She testified that Appellant then regained control and again tried to suffocate her. She said police officers then arrived and pulled him away from her.

The police officers testified that when they arrived at McGee's residence she was lying on the sofa yelling "help me" and Appellant was standing in front of the sofa with nothing in his hands. The coffee table was turned over and pillows were thrown about the living room. The officers removed Appellant from the apartment to investigate the situation.

Appellant told the officers that he was not the assailant, but was instead a good Samaritan. He said that he came to the apartment complex to visit a man named Padre. On his way to Padre's apartment he heard a woman's screams coming from McGee's apartment. He went to her assistance, and as he entered the apartment a white male rushed past him out of the apartment. He tried, without success, to catch the assailant, and then returned to check on the woman. That is when the officers arrived.

The officers found a condom in Appellant's pocket. They did not observe any bruising, cuts, or scrapes on Appellant's face. They went to the apartment that Appellant identified as belonging to Padre, but no one by that name lived there, and its occupants were not familiar with Appellant and did not know anyone named Padre. Police discovered that Appellant was familiar with McGee's roommate, Kyle Brown, who was not present the night of the incident. Appellant had agreed to bring Brown an employment application for a local steakhouse. Brown had given Appellant directions on how to find his apartment.

At McGee's residence, the officers collected the gloves allegedly worn by the intruder, and obtained swabs for DNA testing from the orange towel and from the tire tool. The results of testing the swabs were inconclusive as to Appellant.

McGee's trial testimony was riddled with inconsistencies. On the night of the assault, she told the officers that the assailant was twenty-five years old and had no facial hair. During the trial, she testified that the assailant was more than forty-four years old. She did not remember telling the officers that he did not have facial hair. McGee testified that she only got a profile view of her assailant and that she has problems with her memory. She said that she would not have been able to identify Appellant as her assailant if she encountered him on the street, but was able to do so then because a woman showed her his picture before the trial. McGee testified that the night of the

alleged burglary and alleged attempted rape she had taken her usual dosage of Klonopin, Xanax, Lyrica, Hydrocodone, and anti-depressants.

Appellant was indicted for one count of burglary in the first degree, one count of criminal attempt to commit rape in the first degree, and one count of persistent felony offender in the first degree. A Daviess County jury found Appellant guilty of committing burglary in the first degree and fixed his sentence at twenty years' imprisonment and guilty of criminal attempt to commit first degree rape and fixed his sentence at ten years' imprisonment to run consecutively with the burglary conviction. However, because the jury also found him guilty of first degree persistent felony offender, it enhanced the burglary sentence to life imprisonment and it enhanced the attempted rape sentence to twenty years' imprisonment. The judgment of the trial court does not indicate whether the enhanced sentences are be served consecutively or concurrently.[1] Therefore, pursuant to KRS 532.110(2), they are deemed to run concurrently. This appeal followed.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE JUROR SANDEFUR FOR CAUSE.

During jury selection, Appellant challenged juror Dennis Sandefur for cause because he is "related to" Officer Yonts, one of the three police officers that arrived to investigate the incident. Appellant argues that the relationship

[1] Even if the judgment had specified that the enhanced sentences were to run consecutively, KRS 532.110(1)(c) directs that a sentence for a term of years cannot run consecutive to a life sentence. *Yarnell v. Commonwealth*, 833 S.W.2d 834, 838 (Ky. 1992).

to a police witness was cause to strike the juror, and that the trial court erred by not doing so.[2]

This Court has "long recognized that 'a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.'" *Id.* (quoting *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002)); *see also Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). Such a determination "is based on the totality of the circumstances . . . [and] not on a response to any one question." *Id.*

A juror should be stricken for cause "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence[.]" RCr 9.36(1). Appellant contends, and this Court has held, that the probability of bias is the determinative factor in deciding whether a juror should be stricken for cause. *Pennington v. Commonwealth*, 316 S.W.2d 221, 224 (Ky. 1958). Despite a juror's claim of impartiality, objective bias may still disqualify him if "the conditions were such that [his] connections would probably subconsciously affect [his] decision of the case adversely to the defendants[.]" *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991) (quoting *Tayloe v. Commonwealth*, 335 S.W.2d 556, 557 (Ky. 1960)).

[2] Although Appellant notes in his brief that Sandefur said during voir dire that he had been the victim of two vehicular burglaries, he does not argue that those experiences disqualify Sandefur. We have held that "the mere fact that a person has been the victim of a similar crime is insufficient to mandate a prospective juror be excused for cause." *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997) (citing *Sanders v. Commonwealth*, 801 S.W.2d 665 (Ky. 1990)).

We have held that "the existence of a 'close relationship' [is] sufficient to require the court to sustain a challenge for cause and excuse the juror." *Marsch v. Commonwealth*, 743 S.W.2d 830, 833 (Ky. 1987) (citing *Ward v. Commonwealth*, 695 S.W.2d 404 (1985)). Such a close relationship exists when the "court should presume the likelihood of prejudice on the part of the prospective juror[,]" such a relationship may be "familial, financial or situational, with any of the parties, counsel, victims or witnesses." *Id.* (quoting *Commonwealth v. Stamm*, 429 A.2d 4, 7 (Pa. Super. 1981).

However, merely "having some acquaintance with or knowledge about the participants and their possible testimony does not automatically disqualify [a juror] for cause." *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997), *overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.3d 444 (Ky. 2011) (citing *Jones v. Commonwealth*, 737 S.W.2d 466 (Ky. App 1987)). Instead, the relationship must be more substantial. In *Marcsh v. Commonwealth*, we held that two jurors should have been stricken from the jury pool for cause because they were second and third-cousins to the murder victim and another juror who was the wife of the deputy coroner, who had previously discussed the case with her, should have also been stricken for cause. 743 S.W.2d at 833. In *Sanborn v. Commonwealth*, we held that a juror should have been stricken for cause because his wife was the first–cousin of a key witness for the prosecution, the local sheriff who also happened to be the victim's first-cousin. 754 S.W.2d 534, 547 (Ky. 1988), *overruled on other grounds by Hudson v. Commonwealth*, 2002 S.W.3d 17 (Ky. 2006).

Additionally, in *Thomas v. Commonwealth*, we concluded that the trial court erred by failing to strike a juror for cause because the juror's wife was the prosecutor's first cousin. 864 S.W.2d. 252 (Ky. 1993), *overruled on other grounds by Morgan v. Commonwealth,* 189 S.W.3d 99 (Ky. 2006).

Applying those principles to the facts before us compels us to affirm the trial court judgment in the matter. The nature of Juror Sandefur's relationship with Officer Yonts is distinguishable from the foregoing cases. Sandefur and Yonts are only remotely related by marriage; actually, by two marriages: Sandefur is married to a woman whose cousin is married to Yonts. Sandefur is not related by consanguinity to Yonts, and Sandefur's wife is not related by consanguinity to Yonts. While being related by affinity may require the court to strike a juror for cause, bias is only presumed when the personal relationship is shown to be of a very close nature. Sandefur's distant relationship to Yonts is not close enough to presume bias.

While Sandefur's familial relation to Yonts does not create a presumption of bias, an evaluation of their relationship does not reveal the likelihood of an actual or implied bias. Nothing in Sandefur's voir dire statements suggested a close personal relationship existed between the two. Sandefur said that he and Yonts were friendly with each other, but only encountered one another at the occasional family gathering. Their relationship is more aligned with a casual acquaintance, which in and of itself is not sufficient to imply bias that requires striking a juror for cause. Moreover, Yonts was not a key witness or an individual with a personal stake in the outcome of the case.

It is the duty of the trial court to "evaluate the answers of the prospective jurors in context and in light of the juror's knowledge of the facts and understanding of the law." *Stopher v. Commonwealth,* 57 S.W.3d 787, 797 (Ky. 2001)). We find no error in the trial court's evaluation of this juror, and therefore we conclude that the trial judge did not err by failing to strike the juror for cause.

III. THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

Appellant argues that the trial court denied his right to due process by failing to grant his motion for directed verdict because the Commonwealth failed to produce substantial evidence to prove, beyond a reasonable doubt, that he burglarized and attempted to rape McGee. Specifically, he argues that his conviction rests solely on the inconsistent testimony given by McGee and that a conviction must stand on "evidence of substance."

Before granting a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) ("If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given."). On appellate review, the test of a directed verdict is: "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal" *Id.*

Appellant argues that he was entitled to a directed verdict because he was convicted based on inferences that were based on other inferences. *See Pengleton v. Commonwealth*, 172 S.W.2d 52 (Ky. 1943) ("The jury may not in determining the facts base an inference upon an inference. When an inference is based on a fact, that fact must be clearly established and if the existence of such a fact depends upon a prior inference no subsequent inferences can legitimately be based upon it."). However, upon review of the record, we determine that Appellant's conviction rests on both direct and circumstantial evidence.

Additionally, a conviction can stand on circumstantial evidence as long as, based on the totality of the evidence, reasonable minds can find guilt beyond a reasonable doubt. *See Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983).

In the present case, Appellant was seen by police officers in McGee's apartment approximately four minutes after McGee called 911 for help, a call she said she made *before* her assailant entered. The apartment was disheveled, indicating that a struggle had occurred. McGee was found by the officer lying on her sofa, yelling "help me," with her pants pulled down to her thighs. Appellant was standing over her.[3] Appellant's alibi could not be

[3] Officer Yonts testified that Appellant was bent over McGee and she was trying to push him away. Officer Matthews testified that upon his arrival Appellant was standing in front of McGee, who was on the sofa. Officer Matthews was the first to enter McGee's apartment.

verified by the investigating officers. Swabs of the crowbar and towel that were submitted for testing failed to exculpate Appellant.

Of course, McGee's inconsistent testimony gives pause, but the jury heard those inconsistencies and Appellant's arguments, and judged the facts accordingly. Upon drawing all fair and reasonable inferences in favor of the Commonwealth and reviewing the evidence as a whole, we cannot conclude that it was unreasonable for a jury to find Appellant guilty of burglary and attempted rape. Therefore, the trial court did not err by denying Appellant's request for a directed verdict.

IV. CONCLUSION

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

Minton, C.J., Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur.

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