ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION I

CACR06-1160

STEPHEN EARL DAVIS

JUNE 20, 2007

APPELLANT

v.

APPEAL FROM THE SEVIER COUNTY CIRCUIT COURT

STATE OF ARKANSAS

[CR2005-47]

APPELLEE

HONORABLE TED C. CAPEHEART, JUDGE

AFFIRMED

A jury in Sevier County Circuit Court convicted appellant, Steven Earl Davis, of sexual indecency with a child. The jury sentenced him to six years' imprisonment in the Arkansas Department of Correction and a fine of $1,000. He has two arguments on appeal. First, appellant argues that the trial court erred in replacing juror Sullivan with an alternate juror at the close of all the evidence. Second, appellant argues that the trial court erred in allowing the prosecuting attorney to conduct voir dire on the specific range of punishment. We affirm.

Although both arguments include circumstances related to voir dire, the facts relevant to appellant's first point on appeal extend throughout the trial. During voir dire, the trial judge inquired whether anyone had any personal knowledge regarding the facts or people involved in the case that would prevent the person from serving as a juror. In response to the trial judge's inquiry, Scott Sullivan, a potential juror, informed the court that he had previously seen appellant and that he "just [knew] who he [was]." He explained that appellant's ex-father-in-law worked for him on

his farm and that appellant had visited the farm on occasion. He also explained that he knew several of appellant's family members. Nevertheless, he stated that he thought he could be fair and impartial if selected to serve on the jury.

Also during voir dire, both the defense and the prosecution read the names of potential witnesses that could be called to testify. Both Marvela Rhone and Jimmy Richardson were included in the defense's list of witnesses. Included in the prosecution's list of witnesses was Chris Sassell. When the trial judge asked if there was anyone that could not fairly judge the testimony of the witnesses listed by both sides, none of the potential jurors responded.

As jury selection proceeded, Sullivan's name was drawn as a juror. The prosecuting attorney then questioned the five jurors whose names were drawn, asking if any of them had a relationship with any of the parties, their families, or witnesses. Sullivan responded that he knew several of the witnesses who were going to testify on behalf of the defendant; however, he stated that he could set aside his personal knowledge of the witnesses. The prosecuting attorney explained to the potential jurors that they should speak up if they were persuaded a certain way before hearing all the evidence. Then, when none of the potential jurors had any questions, the prosecuting attorney stated that he thought the potential jurors would follow their oath and listen to the evidence, and thus, give appellant a fair trial. With no peremptory challenge from either party, Sullivan was seated as a juror.

After the jury was seated, the trial on the merits began, at which time Marvela Rhone, appellant's former mother-in-law, and Jimmy Richardson, were called as character witnesses for the defense. During the testimony, Chris Sassell was described as being present at the time the illegal activity took place. At the close of the evidence, the trial judge excused the jury from the courtroom. During the recess, the trial judge announced to the parties that the circuit clerk had

informed him that juror Sullivan had stated that he did not know if he could remain on the jury. The trial court stated that the parties could either agree to release Sullivan as a juror and substitute with the alternate juror or a hearing would be held to determine how to proceed. Because both parties did not agree to replace Sullivan with the alternate juror, the judge determined that a hearing was necessary.

Juror Sullivan was present for the hearing, and he provided the court with several reasons why he could not continue to serve on the jury. First, he stated that Marvela Rhone and her husband both worked for him on his farm. He explained that because he knew Mrs. Rhone, whatever she testified to, he would "take to the bank." He also stated that because he would see Mrs. Rhone every day on the farm, he would be uncomfortable voting to convict appellant after hearing her testify as to appellant's good character. Second, he stated that Chris Sassell had previously hauled hay for him and that Jimmy Richardson had previously done dozer work for him. Finally, Sullivan explained that his position as a State Representative "may lend too much clout to the decision making process." Following Sullivan's explanation as to why he could not continue to serve on the jury, the trial court informed the parties of its intention to substitute the alternate juror. The prosecution was in agreement with the trial court to substitute Sullivan with the alternate juror; however, defense counsel objected, stating that Sullivan was not disqualified, that he was chosen earlier without objection, and that nothing had changed since he had been seated as a juror. Over defense counsel's objection, the trial judge excused Sullivan from the jury and replaced him with the alternate juror. From there, the trial continued and the instructions were read to the jury.

For his first argument, appellant asserts that the trial court abused its discretion in removing juror Sullivan after the jury had been selected, sworn, and all the evidence had been presented. In doing so, he cites to the dissent in *Strickland v. State*, 74 Ark. App. 206, 46 S.W.3d 554 (2001).

However, the majority opinion in *Strickland*, addressed this very issue by stating:

> We first note that Ark. Code Ann. § 16-31-102(c) provides that "[n]othing in this section shall limit a court's discretion and obligation to strike jurors for cause for any reason...."
>
> Secondly, appellant's position that the statute forbids a challenge for cause once a jury is impaneled and sworn directly contradicts our case law and would impermissibly limit a judge's obligation to ensure that a defendant receives a trial with an impartial jury. In *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995), the trial court replaced a seated juror with an alternate juror. On the third day of trial and after the State had rested, the trial court received a report that the juror was riding to court each day with a spectator and that the spectator's son dated the defendant's mother. The juror had not mentioned this during voir dire. The trial court conducted a hearing and, in order to avoid any appearance of impropriety, seated an alternate juror. The Arkansas Supreme Court held that the trial court did not err in excusing the juror and seating the alternate juror in order to avoid an appearance of impropriety. *Id.* (citing *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, *cert. denied*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981)).
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> The Arkansas Supreme Court similarly found no abuse of discretion where a judge removed a seated juror and replaced him with an alternate after accepting the word of a jail trusty over the word of the removed juror. *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000). The court explained that it "is true that this matter was decided largely as one of credibility, but this court has consistently held that the trial court is in the best position to judge the credibility of the witnesses and to resolve any conflicts in that testimony." *Id.* at 515, 11 S.W.3d at 559-60.

Strickland, 74 Ark. App. at 209, 46 S.W.3d at 556-57.

Appellant attempts to distinguish this case from *Strickland* and a case cited in *Strickland*, *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995). In doing so, appellant submits that the root of this court's holding in *Strickland* was the juror's failure to disclose his bias during voir dire, and that the present case is distinguishable in that the removed juror disclosed his bias to the court during voir dire. Whether during voir dire the juror responded by silence, as in *Strickland* and *Bradley*, or whether he disclosed his personal knowledge and then assured the trial court that his personal knowledge would not affect his ability to make an independent determination of the evidence presented, requires the same analysis—a determination of credibility on the part of the trial court

that is not reversed absent an abuse of discretion. Under these facts, we find no abuse of discretion. *See Urquhart v. State,* 275 Ark. 486, 631 S.W.2d 304 (1982) (holding that the impartiality of a juror is a question of fact for the trial court to determine in its sound discretion); *Franklin v. Griffith Estate,* 11 Ark. App. 124, 666 S.W.2d 723 (1984) (stating that the trial court has much latitude and discretion in passing on the qualifications of jurors, and unless abused, its action will not be reversed on appeal). Furthermore, it has been held that an appellant must show prejudice when the trial court removes a juror and seats an alternate in a juror's place because we will not reverse for harmless error. *Heinze v. State,* 309 Ark. 162, 827 S.W.2d 658 (1992). We hold that appellant failed to demonstrate error and that failure would preclude reversal even if the trial court's action in replacing Sullivan was in error.

For his second point on appeal, appellant titles his argument as follows, "the trial court erred in allowing the prosecuting attorney to conduct voir dire on the specific range of punishment"; however, appellant actually argues that the prosecutor's statements "went too far" when he asked the potential jurors to commit to a certain prison sentence if they convicted appellant for the crime. The argument appellant makes on appeal is substantially different from the argument made at trial. Our law is well established that arguments not raised at trial will not be addressed for the first time on appeal, and that parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Hutcherson v. State*, 74 Ark. App. 72, 47 S.W.3d 267 (2001) (citing *Nix v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996)).

Appellant's second argument is limited to the following facts regarding voir dire. During voir dire, the prosecutor began to make the following statements to the jurors, "This is a Class D,

as in David, felony. It carries up to six years in the penitentiary and a fine up to–". The prosecutor did not finish his sentence, as he was interrupted by defense counsel's request for a bench conference. During the bench conference, defense counsel made the argument that questions about sentencing were not permissible in bifurcated proceedings and that "revelation" of the possible range of punishment at this phase was prejudicial to the defendant, warranting the quashing of the jury panel. The trial judge determined that the prosecutor could request that the members of the jury consider the full range of punishment and allowed the prosecutor to continue with voir dire. The prosecutor proceeded by stating,

> All of that again will be explained as we go along, but today and now at this hour I need to know whether or not, knowing what the Judge has told you about the charges, you can consider a term of years in the penitentiary in the event that you found the defendant guilty. Now, having heard generally what the case is about and I'm telling you and you certainly have guessed, the State is going to ask for a term of years in the penitentiary in the event you find the defendant guilty. Is there anyone who feels like they couldn't assess that or consider the full range of punishment? If you have any doubt, now is the time to say.

The jurors did not respond to the prosecutor's inquiry, and voir dire was concluded.

It is evident from the record that appellant's argument on appeal—that the trial court erred in allowing the prosecutor to ask the potential jurors to commit to a certain prison sentence if they convicted appellant—was not made to the trial court and is being made for the first time on appeal. Therefore, his argument was not preserved for our review. In addition, defense counsel did not object to any of the prosecutor's statements made after the bench conference, and both defense counsel and the prosecution acknowledged that the jury was satisfactory. Even if we were to reach the merits of the argument, we would find that this was a proper inquiry and affirm on this point. *See* Ark. R. Crim. P. 32.2 (2005*)*; *Dillard v. State*, 363 Ark. 491, 215 S.W.3d 662 (2005) (holding that the course and conduct of voir dire examination of prospective jurors are within the circuit

judge's sound discretion, and the latitude of that discretion is wide; decisions regarding voir dire will not be reversed absent an abuse of discretion).

Affirmed.

BIRD and VAUGHT, JJ., agree.