

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000262-MR

TIMOTHY RAY SCOTT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 01-CR-00117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM; McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Timothy Ray Scott ("Scott") appeals from a final judgment and sentence of imprisonment entered by the Fayette Circuit Court following a jury trial in which he was convicted of second-degree assault and of being a persistent felony offender in the first degree. The trial court sentenced Scott to a total of ten years' imprisonment. After reviewing the record and applicable law, we affirm.

Scott was indicted on January 29, 2001, for second-degree assault and for being a first-degree persistent felon. This indictment stems from events occurring on November 11, 2000.

On November 11, 2000, Melissa Rife ("Rife"), Jessica Sullivan ("Sullivan"), and Stacy Devine ("Devine") gathered at the home of Whitney Jones ("Jones"). Sullivan and Devine left Jones's home to obtain some beverages for the group for the evening. After obtaining the beverages, Sullivan and Devine returned to Jones's residence accompanied by Scott, who was Sullivan's boyfriend at this time. Agitated with Scott's presence, Devine asked Sullivan to take her home. Sullivan agreed, leaving Rife, Jones, and Scott at Jones's residence.

Rife testified that at this point, Scott initiated a conversation with her concerning a prior incident wherein Scott left a lit cigar on a table at Rife's residence. Rife had never addressed this incident with Scott, but informed Sullivan about Scott's conduct. Even though Rife initially refused to discuss this incident with Scott, Scott succeeded in his efforts to force Rife to discuss this incident with him. During this discussion, Scott refused to apologize to Rife for damaging her table. Instead, Scott began yelling at Rife and directed vulgar comments to her. Rife repeatedly requested Scott to leave her alone, to which Scott responded by throwing a drinking glass at Rife. The glass missed Rife. Scott then approached Rife and began hitting her numerous times, causing Rife to lose consciousness.

Jones testified that Scott continued to strike Rife, even after knocking Rife unconscious. At this point, Sullivan returned to Jones's residence and assisted Jones in pulling Scott away from Rife. Sullivan and Scott immediately fled the scene,

leaving Rife bleeding and unconscious on the floor. Jones revived Rife by patting her on the face.

Rife was immediately taken to Central Baptist Hospital where she was treated for a broken jaw, bruises, a cracked tooth, and a cut on her right cheek that required stitches. Rife testified that she underwent surgery to repair her broken jaw, which was wired shut for six weeks. Rife further stated that she still experiences problems with her injuries.

Sullivan testified at trial for Scott. During her testimony, Sullivan stated that she, Rife, and Jones were very close friends before she began dating Scott. This friendship became strained, however, because Sullivan spent the majority of her time with Scott instead of Rife. Sullivan further testified that she was aware of the incident involving Scott's cigar and informed Scott of Rife's complaints.

Concerning the events of November 11, 2000, Sullivan testified that after taking Devine home, she returned to Jones's residence to find Scott and Rife discussing the cigar incident, with Rife getting "hyper" about those events. Upset that her best friend and her boyfriend were arguing, Sullivan left the room. After hearing Rife daring Scott to hit her, Sullivan returned to the room to convince Scott to leave with her. According to Sullivan, while she was obtaining Scott's jacket, Rife threw a glass at Scott and hit him in the head. Scott retaliated by errantly throwing his drinking glass at Rife. Sullivan further stated that Rife then arose from a couch and attacked Scott, ripping Scott's shirt off and scratching his

chest. At this point, Sullivan and Jones were able to separate Scott and Rife. Scott and Sullivan then left Jones's residence.

The jury convicted Scott of second-degree assault and for being a persistent felony offender in the first degree. The jury further recommended a sentence of five years' imprisonment for the assault conviction, enhanced to ten years under the persistent felony offender conviction. The trial court accepted the jury's sentencing recommendations and sentenced Scott accordingly. This appeal followed.

On appeal, Scott presents several arguments for our consideration. First, Scott argues that the trial court erred in not striking a juror for cause. During voir dire, Juror 253 informed the trial court that she was an attorney who briefly practiced in Fayette County in the area of domestic relations. Further, this juror stated that she served as an intern in the office of the Fayette Commonwealth's Attorney during her third year of law school. Juror 253 also admitted that, even though she was prosecution-minded in her thinking, she would attempt to be fair and impartial by requiring the Commonwealth to meet its burden of proof before voting to convict Scott. Scott moved the trial court to strike Juror 253 for cause, arguing that based upon her statements and prior internship with the prosecutor's office, this particular juror was biased for the prosecution. The trial court denied Scott's motion. Scott used a peremptory challenge to remove Juror 253 from the jury panel.

The Kentucky Supreme Court's decision in Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991), provides the foundation

for our analysis of the qualifications for prospective jurors and the correctness of the trial court's rulings. Montgomery directs attention to the totality of the evidence on voir dire with the comprehensive question being whether the juror has a mental attitude of "appropriate indifference." Id. at 717-718. Montgomery also rejects the idea that a "magic question" may be asked which can rehabilitate a juror whose answers to voir dire questions demonstrate a pervasive prejudice. Id. Additionally, a juror should be disqualified if that juror has a close relationship with a victim, a party or an attorney, even if the juror claims to be free from bias. Butts v. Commonwealth, Ky., 953 S.W.2d 943, 945 (1997). However, the trial court maintains discretion to evaluate the answers of prospective jurors in context and in light of the juror's knowledge of the facts and her understanding of the law. Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990).

RCr 9.36(1) requires that a juror be excused for cause if reasonable grounds exist to believe that a juror cannot render a fair and impartial verdict. Despite this directive, a per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire. Mabe v. Commonwealth, Ky., 884 S.W.2d 668, 671 (1994). The test is not whether a juror agrees with the law when it is presented during voir dire, but whether after hearing all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict. Id.

The record herein demonstrates a thorough voir dire examination by the trial court and counsel. Juror 253 stated upon questioning that, despite her personal bent, she could view the facts impartially. In responding to questions about her internship in the prosecutor's office, this potential juror stated that she did not work directly with the attorney prosecuting Scott, nor did she possess any information concerning the allegations against Scott. Finally, Juror 253 informed the trial court that she would require the Commonwealth to meet its burden of proof before voting to convict. With due deference to the opportunity of the trial court to observe the demeanor of the prospective jurors and understand the substance of their answers to voir dire questions, we find no error in the trial court's refusal to strike Juror 253 for cause.

Scott further argues that he was denied a fair trial because he was forced to use a peremptory challenge to remove Juror 253 from the jury panel. We disagree. In United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), the United States Supreme Court noted that peremptory challenges are not of constitutional dimension. So long as the jury that sits is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the right to a fair trial was violated. Id. Here, Scott used his peremptory challenge in line with the reason for such challenges, to help secure the constitutional guarantee of a trial by an impartial jury. Thus, we find no merit in Scott's

claim that he improperly lost a peremptory challenge when he removed Juror 253 from the jury pool with a peremptory challenge.

For his next assertion of error, Scott argues that the trial court improperly allowed the Commonwealth to introduce specific details concerning a pending criminal assault charge brought against him by a key defense witness, Jessica Sullivan. We reject this argument.

During her testimony, Sullivan admitted that, on October 15, 2001, she filed an assault charge against Scott¹. Sullivan further testified that she later discovered that an unknown assailant, not Scott, assaulted her and that her allegation against Scott is erroneous. At this point, the Commonwealth introduced evidence that Scott took Sullivan's car keys and left in her car after assaulting her. Sullivan admitted that Scott took her car keys, but did so after she was assaulted. According to the record, Sullivan's criminal complaint against Scott had not been resolved prior to her testimony herein.

Scott argues that Sullivan's criminal complaint against him is not relevant to the assault upon Rife. In support of this assertion, Scott points out that Sullivan's complaint is not a prior bad act admissible pursuant to KRE 404(b) and has no other connection with the matter herein. The Commonwealth argues that the evidence was not introduced as proof of Scott's prior bad acts. Rather, the Commonwealth argues that Sullivan's complaint

¹Sullivan filed this assault charge against Scott approximately nine months after testifying for the Commonwealth before the grand jury investigating the incident herein, and almost one year after the incident between Rife and Scott occurred.

was relevant because she may have been be testifying in Scott's behalf because of bias, duress, fear or intimidation. We agree with the Commonwealth.

KRE 607 specifically authorizes any party to attack the credibility of any witnesses. Matters which may reasonably be expected to color or cause a witness to testify falsely are proper subjects of inquiry. Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988). Kentucky law is quite clear that a witness may be cross-examined on any facts which tend to show bias, interest, or motive which might affect the credibility of the testimony from that witness. Keller v. Commonwealth, Ky., 572 S.W.2d 157 (1978). Further, any interest of a witness in a criminal prosecution is not collateral and may always be admitted to allow the jury to determine the witness's credibility. Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992). overruled in part on other grounds by Shadowen v. Commonwealth, Ky., 82 S.W.3d 896 (2002). The interest of a witness may be proven by the witness' own testimony, upon cross-examination or by independent evidence. Id.; United States v. Abel, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). The federal courts, in interpreting FRE 607,² have held that bias may arise when a witness fears a party or may testify in a particular manner because of intimidation by a party. United States v. Keys, 899 F.2d 983, 987 (10th Cir. 1990); United States v. Manske, 186 F.3d 770 (7th Cir. 1999).

²FRE 607 contains language identical to KRE 607.

In the matter before us, we believe evidence concerning Sullivan's criminal complaint against Scott was properly admitted by the trial court. This evidence was used to attack Sullivan's credibility, not to prove that Scott's action was in conformity with a crime. Also, Sullivan's relationship to Scott, as well as Scott's alleged assault of her, could reasonably be expected to cause Sullivan to testify falsely out of fear for her own safety. Further, Sullivan's impeachment was limited to her own responses and her affidavit supporting her assault allegation against Scott. The sole purpose in impeaching Sullivan with this evidence was to challenge her credibility. Therefore, the trial court correctly permitted the introduction of evidence concerning Sullivan's assault complaint against Scott.

Scott's final argument is that the trial court erred in its instructions on the erroneous belief qualification to the self-defense instruction. He claims that the erroneous belief instruction issued by the trial court may have confused the jury by not limiting the qualification solely to the belief, but including the action he took in reliance upon that belief. Scott concedes that this claim of error was not preserved for our review pursuant to RCr 9.54(2), and asks that we consider it as palpable error under RCr 10.26. We decline this opportunity. In Commonwealth v. Hager, Ky., 41 S.W.3d 828, 846 (2001), our Supreme Court set forth a model instruction on self-protection "Wanton or Reckless Belief" which recognized the wanton or reckless belief could be based on either a mistaken belief as to the necessity for self-protection or a mistaken belief in the

degree of force necessary to protect oneself. While the wording of the instruction at issue may be inartful, we cannot say it deviated from Hager to such an extent as resulted in manifest injustice.

Based upon the foregoing, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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