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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001919-MR

EVELYN CLEARY — APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
APPEAL FROM KNOTT CIRCUIT COURT
v. HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 04-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case is on remand from the Kentucky Supreme Court which granted discretionary review, vacated the Court of Appeals' opinion, and remanded to this court for further consideration in light of *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2008).

Evelyn Cleary was convicted of first-degree trafficking in a controlled substance (oxycodone). She was sentenced to five years' imprisonment. Cleary raises three claims of reversible error: the trial court abused its discretion by overruling an objection and denying a motion for mistrial following a statement about prior complaints against Cleary; the trial court abused its discretion by denying motions to strike three jurors for cause; and the trial court incorrectly excluded as evidence a photograph taken of Cleary's house and property. Having reviewed the record and the law, we affirm with respect to all issues.

On February 18, 2002, Kentucky State Police troopers Chris Fugate and Richard Miller were patrolling in Knott County. While the parties disagree somewhat, the relevant facts appear to be that as the troopers drove past Cleary's residence, they saw Cleary walk toward Janice Mosley, who was sitting in her pickup truck parked in Cleary's driveway. The troopers decided to investigate the situation, as the area was known for high amounts of drug trafficking, and they pulled into the driveway. According to the Commonwealth, Cleary's hands were resting on the door of the truck, partially inside the open window and she appeared to drop something in the truck as the officers exited their car.

Trooper Miller questioned Mosley, who admitted that she had two partially-smoked marijuana cigarettes in her ashtray. In the course of seizing the marijuana Miller noticed a tablet, later identified as OxyContin,[1] on the floorboard of the truck. Mosley then admitted that she had come to Cleary's residence to

[1] OxyContin is a brand name for a tablet containing oxycodone. *See* http://www.fda.gov/cder/drug/infopage/oxycontin/.

purchase the tablet for $50, which she showed the officer. Cleary, by contrast, later claimed that Mosley already had the OxyContin tablet and was asking where she could obtain more.

While Trooper Miller and Mosley were talking outside the house, Trooper Fugate spoke with Cleary and her husband inside the house. Both denied any involvement with drugs. Trooper Miller then entered the house with the tablet, and the officers searched the house with Mr. Cleary's consent. Although the officers found no other contraband, they arrested Cleary and charged her with trafficking in a controlled substance.

Cleary subsequently was indicted, and a jury trial resulted in a conviction. Cleary waived the penalty phase and accepted the Commonwealth's offer of five years' imprisonment. From this conviction and sentence, she now appeals.

Cleary first argues that the trial court abused its discretion in overruling her objection and motion for mistrial after Officer Fugate stated that he had received prior complaints about Cleary. More specifically, Officer Fugate testified as follows:

> Prosecutor: I know it has been better than three years ago, but to the best of your recollection, can you tell the jury the substance of the conversation, or whatever you did, when you were inside the defendant's residence?
>
> Officer Fugate: Well, we basically had, um, I told her that we had received complaints on them for selling controlled substance pills.

Defense Counsel: Objection. May we approach?

During this bench conference, Cleary's counsel moved for a mistrial on the ground that the defense had not been given notice that evidence of such prior bad acts would be introduced. The prosecutor stated that this information was not what he was trying to elicit from the witness, and that he had not been aware of any prior complaints. The judge overruled the motion for a mistrial but admonished the jury, stating:

> The witness testified to a couple of things. One is that they were in the area because they had complaints – I think it was – about drug trafficking in the area . . . . But the jury should disregard the subsequent statement relative to complaints about the defendant. You need to put that out of your mind. Mr. Marshall [Prosecutor] made reference in *voir dire* to the Rules of Evidence, and that's contrary to the Rules of Evidence.

Under KRE[2] 404(b), evidence of other crimes, wrongs or acts is admissible only under limited circumstances. Cleary bases her argument on KRE 404(c), which states:

> In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

[2] Kentucky Rules of Evidence.

Here, the testimony apparently was elicited accidentally in the course of the Commonwealth's questioning and was an isolated occurrence. As the prosecutor evidently was unaware of the complaints mentioned by the officer, he had no duty to give prior notice of the testimony. In any event, the trial court promptly and appropriately admonished the jury to disregard the testimony.

In *Matthews v. Commonwealth*, 163 S.W.3d 11, 17-18 (Ky. 2005), the supreme court stated:

> We have long held that an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition. A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial. The trial court has broad discretion in determining when such a necessity exists because the trial judge is "best situated intelligently to make such a decision." The trial court's decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion.
>
> . . . We noted in *Phillips v. Commonwealth* that "[w]here evidence of other crimes is introduced into evidence through the non-responsive answer of a witness, this court must look at all of the evidence and determine whether the defendant has been unduly prejudiced by that isolated statement." In *Phillips*, a First-Degree Rape trial, the victim gave unsolicited testimony that informed the jury that Phillips had previously escaped from prison. Phillips objected and moved for a mistrial, and although the trial court found the statement inadmissible, it refused to declare a mistrial. On appeal, we affirmed the order of the trial court because we did not believe, "in view of all of the evidence presented by the Commonwealth, that

> Phillips was unduly prejudiced" by the victim's comment.

(Citations omitted.) Here, in view of all the evidence, the trial court's admonition concerning a single, isolated bit of improper testimony was sufficient to cure its erroneous admission. The court did not abuse its discretion by denying the motion for a mistrial.

We are not persuaded by Cleary's argument that a different result is required by *Gordon v. Commonwealth*, 916 S.W.2d 176 (Ky. 1995). During Gordon's trial for first-degree trafficking in a controlled substance, the investigating officer testified that in the course of conducting a county-wide investigation, he developed cause to suspect Gordon of drug trafficking. Thus, the officer placed under surveillance the particular street corner from which the police suspected Gordon of selling drugs. The Kentucky Supreme Court found that the trial court properly admitted the officer's testimony that Gordon was a suspect in a county-wide investigation, as such testimony avoided any implication that he had been unfairly targeted, and it explained why the police gave an informant a recording device and money for a controlled buy. However, the trial court erred by admitting testimony implying that Gordon was a drug dealer or that police suspected him of selling drugs at that particular location, as such evidence was "utterly unnecessary and prejudicial." *Id.* at 179. *Gordon* does not control the matter before us, however, as not only are the facts of the instant proceeding much less egregious than those in *Gordon*, but the trial court below in fact sustained

Cleary's objection to the improper evidence and admonished the jurors to put the evidence out of their minds.

Cleary next argues that the trial court committed reversible error in denying her motions to strike three jurors for cause. We note that the determination "to excuse a juror for cause lies within the sound discretion of the trial court and is reviewed only for a clear abuse of discretion." *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). In *Wood v. Commonwealth*, 178 S.W.3d 500, 515-16 (Ky. 2005), the court noted the rationale behind this rule is that "[t]he trial court has the opportunity to observe the demeanor of a prospective juror, and therefore is in the best position to interpret the substance and nature of that person's responses to voir dire questioning." Further, "[t]he central inquiry is whether a prospective juror can conform his or her views to the requirements of the law, and render a fair and impartial verdict based solely on the evidence presented at trial." *Id.* at 516. On the other hand, case law recognizes that some relationships are so close that, irrespective of voir dire answers, the court should presume bias and excuse the juror. *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717 (Ky. 1991) (citing *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky. 1988), and *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985)).

In this case, after the trial court denied Cleary's motion to strike the three prospective jurors for cause, Cleary used three of her peremptory strikes so that they did not serve on the jury. As recently noted by the Kentucky Supreme Court, the use of peremptory strikes is a substantial right. *Shane v.*

Commonwealth, 243 S.W.3d 336, 341 (Ky. 2007). Thus, if a defendant is forced to remove a juror who should have been removed for cause, the defendant's rights are violated. *Id.* at 341. We therefore must decide whether the trial court abused its discretion in failing to strike for cause any of the three jurors.

The jurors in question below were M.B., the wife of a bailiff at the Knott County courthouse and the sister-in-law of the local sheriff; D.T., a retired Indiana police officer; and R.P., a nursing home employee. M.B. and D.T. both stated they could consider the evidence and be fair. Cleary, nevertheless, argues that they should have been excused for cause because their respective ties to law enforcement created a "reasonable ground to believe that [they could not] render a fair and impartial verdict on the evidence[.]" RCr[3] 9.36(1).

The Kentucky Supreme Court, however, has not adopted a *per se* exclusion of jurors due to connection to law enforcement agencies or personnel. *See Soto*, 139 S.W.3d at 848-50 (no error in failing to strike for cause juror whose daughter and son-in-law were police officers); *Sanders v. Commonwealth*, 801 S.W.2d 665, 670 (Ky. 1990) (fact that potential juror was law enforcement officer "was not sufficient reason to excuse him for cause"); *Smith v. Commonwealth*, 734 S.W.2d 437, 445 (Ky. 1987) (no error in failing to excuse deputy sheriff). In *Shane*, by contrast, a prospective juror's exclusion was required not because he was a police officer, but because his statements during voir dire "that he was 'absolutely' pro-police and that he did not believe an officer would lie under oath

[3] Kentucky Rules of Criminal Procedure.

clearly indicated that a defendant would have little or no chance of challenging an officer's testimony in this juror's mind." 243 S.W.3d at 338. The challenged jurors below did not make comparable statements. We further note that the law enforcement witnesses who testified in this case were officers with the Kentucky State Police, rather than officers of the agencies with which either M.B. or D.T. had family or employment connections. The trial court did not abuse its discretion in denying Cleary's motion to strike M.B. and D.T. for cause.

The third prospective juror, R.P., indicated that her stepson had a problem with drugs, that she worked in a nursing home where some patients had drug problems, and that she agreed with the statement that her negative experience with drugs could unconsciously affect her decision. Nevertheless, she thought she could be fair and would not be affected by her personal experiences. As noted by the court in *Wood*, "[w]hen ruling on a challenge for cause, it is the probability of bias or prejudice that is determinative." 178 S.W.3d at 517 (citing *Montgomery*, 819 S.W.2d at 718). Having reviewed the record and the totality of R.P.'s responses, we do not believe her answers demonstrated the probability of bias or prejudice. Therefore, the trial court did not abuse its discretion in denying Cleary's motion to strike R.P. for cause.

Cleary's final argument is that the trial court erred by excluding from evidence a photograph depicting her house and surrounding property. We disagree.

Part of Cleary's defense was that because hills and trees partially shielded her house from the road, the police could not have seen her exit the house and walk toward the truck. The Commonwealth objected and the trial court agreed that a photograph, taken two weeks before trial in June 2005, was inadmissible as it did not accurately depict the scene at the time of Cleary's arrest in February 2002.[4]

Cleary argues that the passage of time and the difference in seasonal plant growth could have been explained to the jury when the photograph was introduced into evidence. Indeed, the "mere fact that a photograph was taken at a time different from the date of the incident in question does not render it inadmissible if it can be established as a substantial representation of the conditions as they then existed." *Turpin v. Commonwealth*, 352 S.W.2d 66, 67 (Ky. 1961). However, in this case, the vegetation shown in the photograph almost completely obscures the house. Perhaps more importantly, Trooper Fugate stated that the officers viewed the house and alleged transaction from an angle opposite of the location from which the picture was taken.

Our review of the photograph confirms that viewing the scene from an angle opposite to that used by the officers could have created a substantial danger of confusing the jury as to whether the officers could have possibly seen Cleary. KRE 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice,

[4] The trial court permitted the photograph to be introduced into the record to preserve the issue for appellate review.

confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." As the photograph clearly could have misled the jury, the trial court did not err by excluding it from evidence. For the foregoing reasons, the Knott Circuit Court's judgment is affirmed.

MOORE, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent from that portion of the majority opinion which finds no error in the refusal of the trial court to strike a juror whose close ties to law enforcement should have disqualified her. The juror in question was the wife of a bailiff at the courthouse where the case was being tried and the sister-in-law of the local sheriff. While it is true that, upon questioning, she stated that she could be fair and impartial in deciding the case at bar, I believe that the "conditions may be such that [her] connection would probably subconsciously affect [her] decision." *Randolph v. Commonwealth,* 716 S.W.2d 253, 255 (Ky. 1986), overruled on other grounds by *Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1988). The court there also said "[i]t is always vital to the defendant in a criminal prosecution that doubt of unfairness be resolved in his favor." *Id*. at 255.

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