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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001716-MR

TERESA YVETTE SHANNON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 06-CR-00611

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Teresa Shannon (Shannon), appeals from McCracken Circuit Court convictions on the charges of third-degree assault,[1]

[1] Kentucky Revised Statutes (KRS) 508.025 states that a person is guilty of Assault in the Third Degree when he or she "recklessly or intentionally causes or attempts to cause physical injury to a city peace officer."

resisting arrest,[2] and disorderly conduct.[3] Shannon claims that the trial court erred in three ways: (1) by preventing Shannon from questioning potential jurors about race during jury selection; (2) in finding that Shannon's arrest was lawful; and (3) by submitting jury instructions that allowed for a non-unanimous verdict on the charge of third-degree assault. Having thoroughly reviewed the arguments of the parties, the record, and the applicable law, we affirm.

On November 21, 2006, officers from the Paducah Police Department went to Shannon's home to serve a warrant on her daughter. The exchange between Shannon and the officers was recorded by a body microphone system worn by one of the officers. Shannon answered the door, and the police immediately asked whether her daughter was home. Shannon provided the police with inconsistent answers, and then shut the door.

Not understanding whether Shannon's daughter was home, the police repeatedly rang the doorbell and knocked at the door. Shannon then yelled profanities at the officers. The police then warned Shannon that she needed to calm down, refrain from profanity, and lower her voice. When these warnings were ignored, the police attempted to arrest Shannon. An officer tried to handcuff Shannon, but she ran into her home. The officers followed Shannon inside, where

[2] KRS 520.090 states that a person is guilty of resisting arrest when he "intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of an actor ... by using any other means creating a substantial risk of causing physical injury to the peace officer."

[3] KRS 525.060 defines disorderly conduct as "when in a public place and with intent to cause public annoyance or alarm, or wantonly creates a risk thereof, he makes unreasonable noise."

she continued to resist and verbally assault the officers. Shannon then struck one of the officers in the face, drawing blood. The police then forced Shannon to the ground, handcuffed her, and placed her under arrest.

Thereafter, on December 21, 2006, a McCracken County grand jury indicted Shannon on charges of third-degree assault, resisting arrest, and disorderly conduct. A jury trial followed. During voir dire, Shannon's counsel asked the venire, "Does anybody here think it's gonna be a problem if we have a jury of all one, of all one race?" The Commonwealth objected and a bench conference immediately followed. The defense attorney asserted that his client was arrested by two white police officers, and that accordingly, he was entitled to pose race-oriented questions to the prospective jurors.

In response, the court stated that race was "not an issue in this case" because the case did not concern a hate crime, and it was not a capital case, and because the issue wasn't ripe. The court also stated, "You can't ask that. Quit, just quit." Before leaving the bench, defense counsel made brief reference to the Sixth and Fourteenth Amendments.

Defense counsel then continued his questioning without further mention of race. Further, aside from the question which was objected to, counsel failed to make a proffer of any additional questions about race that he wanted to ask but was prevented from doing so.

During a subsequent bench conference after the jury was selected, defense counsel renewed his objection to the trial court's prohibition against race-

related questioning during voir dire. Specifically, counsel objected to the fact that he was not allowed to ask questions regarding race, and because he asserted that the jury did not represent a fair cross-section of the community. In response to Shannon's objections in this regard, the court responded that the objection was sustained only as to the specific question asked, rather than to the entire line of questioning. The court further stated that, "I don't think their opinion as to the makeup of the jury is relevant to any case, so there. Let's go on."

On June 28, 2007, a jury found Shannon guilty on all counts, and sentenced her to a total of three and a half years imprisonment. Subsequently, on August 3, 2007, the trial court probated Shannon's sentence for one year. This appeal followed.

As previously noted, Shannon appeals on what are essentially three separate grounds: (1) that the trial court erred by preventing Shannon from questioning potential jurors about race during jury selection; (2) that the trial court erred in finding that Shannon's arrest was lawful; and (3) that the trial court erred in submitting jury instructions that allowed for a non-unanimous verdict on the charge of third-degree assault. We address these issues respectively.

On appeal, Shannon argues first that the trial court erred when it refused to allow defense counsel to voir dire the panel about racial bias. In support of her argument in that regard, Shannon asserts that an adequate voir dire is crucial to a fair trial, and that the right to an impartial jury is basic to the American system of justice. *See Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491

(1968). Shannon states that one of the most effective safeguards for securing an impartial jury is the jury challenge. She asserts that she was never allowed to ask questions directed toward racial bias or animus, despite the fact that the jury was entirely Caucasian and in light of the fact that McCracken County's population was 24 percent African-American.

Shannon argues that because she had an all-white jury, was arrested by two white police officers, and was prosecuted by a white person, she should have been allowed "to ask questions getting at whether venire members held such racial biases or racial animus that they could not be fair."[4] Accordingly, Shannon asserts that because she was not allowed to ask questions concerning the racial make-up of the jury, her rights to an impartial jury and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and § § 2, 7, and 11 of the Kentucky Constitution were violated. In addition, Shannon asserts that the court's decision was an unreasonable application of and contrary to established U.S. Supreme Court precedent in the cases of *Ristaino v. Ross*, 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

In response, the Commonwealth argues first that this alleged error was not preserved for review. The Commonwealth states that other than the initial question posed to the jury, Shannon did not state what other questions she would

[4] See Appellant's brief, p. 10.

have asked the venire. In support thereof, the Commonwealth cites this Court to the decision rendered by our Kentucky Supreme Court in *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), wherein the issue was whether the trial judge improperly limited defense counsel's voir dire regarding the applicable penalty range. The Court ultimately found the issue to be unpreserved, stating:

> Lawson's trial counsel then addressed a new line of questioning and did not return to the topic of the penalty range ... We conclude that Lawson's failure to propose a question which properly defined the appropriate penalty range presents no properly preserved error for our review. As Lawson made no further effort in the trial court to voir dire the panel on the correct penalty range, his argument hinges on speculation that the trial court would not have permitted him to ask questions he wished to ask, and he has not preserved this error for our review.

Lawson, 53 S.W.3d at 541-45 (Ky. 2001). Similarly, in *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005), the Supreme Court refused to reverse a conviction because defense counsel did not specifically state which questions he wished to ask the venire on the record.[5]

Further, the Commonwealth asserts that the trial judge did not limit Shannon's voir dire. The Commonwealth states that in response to the objection of the prosecutor, the trial court directed defense counsel to stop the line of inquiry regarding the venire's opinion about an all-white petit jury, but did not direct counsel to cease any and all inquiries regarding racial animus.

[5] In the same decision, the Court reversed the convictions on a separate issue concerning voir dire where counsel specifically preserved the questions he wished to ask but was denied by the trial court.

The Commonwealth further argues that defense counsel could and should have offered the questions he wanted to ask for the record, but did not. Indeed, the Commonwealth noted that its objection at the time went to the particular question asked by counsel, and not to all race-based questions, as counsel stated, "Other race-based questions, perhaps, would have been proper. I don't know. You didn't ask those questions."[6] Likewise, the Commonwealth asserts that when addressing this issue, the trial court stated, "I don't think their opinion as to the makeup of the jury is relevant to any case, so there. Let's go on."[7]

Having reviewed the record and applicable law, we are in agreement with the Commonwealth that Shannon has failed to properly preserve this issue for our review. In reviewing the record, we note that the Commonwealth's objection to Shannon's question was not about the issue of race itself, but instead addressed what the jury as a whole felt about an all-white jury trying a black defendant. Indeed, our review of Shannon's question indicates that her question was primarily concerned not with the bias of any one individual prospective juror, but with prospective jurors' perception of the make-up of the jury panel as a whole.

We are of the opinion that his type of question is not one of the sort which would elicit any pertinent information as to the bias or prejudice of any individual juror, and would not provide counsel with any substantial support upon

[6] *See* VR2; 06/28/07; 10:50:45-10:55:45.
[7] *Id.*

which to base a preemptory strike or challenge for cause. Accordingly, we believe the court properly sustained the objection of the Commonwealth to this question.

Furthermore, having reviewed the record, we find that contrary to Shannon's argument, the court below did not limit counsel's ability to ask other questions directed to the racial animus or bias of potential jurors. It was the responsibility of Shannon's counsel to make known to the court the actions counsel desired the court to take. *See* Kentucky Rules of Criminal Procedure (RCr) 9.22, and *e.g., Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972)(*overruled on other grounds by Sasaki v. Kentucky*, 410 U.S. 951, 93 S.Ct. 1422, L.Ed.2d 684 (1973))[8].

In the matter *sub judice*, while Shannon's counsel objected to the court's limitation on one particular question, our review of the record does not indicate that counsel explained to the court the nature of the additional race-related questions he wished to ask. Accordingly, as previously set forth by this Court in *Lawson*, Shannon's arguments hinge upon what is essentially "speculation" that the trial court would not have permitted her to ask the additional questions she desired. As a result, we cannot find that this issue was preserved for our review.

[8] This case concerned a physician charged with performing an abortion in violation of a statute in effect at the time of the decision, but since found unconstitutional. Counsel submitted several questions to potential jurors during voir dire concerning the nature of their opinions on the abortion issue, as well as in reference to religious views. In the midst of jury selection, the Court called counsel for both sides to chambers and advised that it would be conducting the remainder of voir dire itself. Counsel objected in chambers, and later insisted that he was denied the right of examining jurors as guaranteed by RCr 9.38. In addressing the issue, our Kentucky Supreme Court held that if there was an unfavorable ruling made in chambers, it was incumbent upon appellant to see to it that the proceedings were made a part of the record. The Court was of the opinion that appellant did not make known to the court the action he desired the court to take, nor his objection to the action of the court as required by RCr 9.22.

See Sasaki, *supra*, *Lawson, supra*, and RCr 9.22. Having so found, we decline to overturn the trial court on this issue.

As her second basis for appeal, Shannon asserts that her arrest was illegal and without probable cause. On February 26, 2007, Shannon filed a one-page motion to suppress, stating that she wished to suppress certain evidence because the police arrested Shannon illegally and without a warrant. In support of her motion, Shannon stated that she was relying upon the Fourth and Fourteenth Amendments of the U.S. Constitution, as well as § § 1, 2, and 10 of the Kentucky Constitution and related caselaw. On May 2, 2007, a suppression hearing was held during which both the Commonwealth and Shannon presented testimony.

Both Shannon and the Commonwealth each called one witness. The Commonwealth called Officer Orazine, who described going to Shannon's house and looking for her daughter, Shannon's yelling of profanities, and Shannon's disorderly conduct, as well as his repeated warnings, attempts to arrest Shannon, and Shannon's attempt to strike Officer Smith. Officer Orazine also testified that Shannon's yelling and cursing was so loud that it echoed off of nearby homes and caused people in the neighborhood to look and see what was happening. On cross-examination, Officer Orazine confirmed that Shannon was placed in handcuffs inside her home and that she assaulted Officer Smith while in the house.

Shannon called L. Johnson as her witness during the suppression hearing. Johnson testified that he was present during the incident and that neither he nor Shannon was on the porch. Johnson testified that the incident took place

inside Shannon's house. On cross-examination, Johnson confirmed that Shannon cursed and yelled, but he did not believe that the yelling was heard across the street. Johnson also testified that Shannon was yelling inside her home.

At the conclusion of the testimony, Shannon did not present any argument, but sought instead to submit a brief and audio tape of the incident. The trial court agreed, and on May 10, 2007, Shannon filed a five-page memorandum in support of her motion to suppress, as well as copies of an unpublished decision from this Court, and an unpublished decision from the Court of Appeals for the Sixth Circuit.

In the memorandum, Shannon explained that the basis of her motion to suppress was that her arrest was illegal and made without probable cause. We note that in the opening paragraph of the "Argument" section of the memorandum, Shannon focused her argument on "the narrow issue of whether a person responding to police questioning can be arrested for disorderly conduct solely when the alleged conduct takes place at her residence."[9]

In the remainder of her memorandum, Shannon argued that state and federal case law interpreting KRS 525.060 do not allow for a person to be arrested for disorderly conduct while at a private residence and not a public place. Shannon also expressly noted that her argument did not hinge on whether she was inside her house or on the porch when she yelled at the officers, stating:

> Teresa Shannon's conduct clearly does not qualify as disorderly conduct. The incident happened at a private

[9] *See Trial Record,* p. 28.

> place, well within the confines of Shannon's property. Even if the court accepts the testimony of Officer Orazine, Shannon never left her front porch. No Kentucky Court has ever upheld a disorderly conduct conviction that took place at a private residence.

Thereafter, on May 16, 2007, the trial court issued an order denying the motion to suppress. In so doing, the trial court found that Shannon's arrest was lawful because her unruliness had created a disturbance in the neighborhood in violation of KRS 525.060, a misdemeanor, thereby permitting Shannon to be arrested without a warrant. Subsequently, at trial, Shannon renewed her motion to suppress, adding, in addition to the aforementioned arguments, that the statute permitting arrest for a misdemeanor, KRS 431.005, does not apply when the arrest takes place in the home.[10] The trial judge again denied the motion.

When reviewing a trial court's decision on a motion to suppress, the appellate court must initially determine whether the lower court's findings are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). If the trial court's findings are supported in this manner, then they are conclusive. *Id.* Based on those findings, the appellate court must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. *Id.*

Interestingly enough, we note that Shannon does not make arguments to our Court on the issue of whether a person responding to police questioning can be arrested for disorderly conduct solely when the alleged conduct takes place at

[10] Shannon does not raise this ground on appeal, and accordingly, we shall not address it further herein.

her residence, nor on the issue of whether the statute permitting arrest for a misdemeanor, KRS 431.005, applies when the arrest takes place in the home, which are the arguments she made to the court below. Therefore, we do not address these issues.

Having reviewed the record and the applicable law, we simply cannot agree with Shannon that her arrest was illegal or without probable cause. We note that the appropriate analysis to be employed in determining whether a misdemeanor arrest is lawful is whether a reasonable officer could conclude from all facts that a misdemeanor is being committed in his presence. *See Commonwealth v. Mobley*, 160 S.W.3d 783, 787 (Ky. 2005). Resisting Arrest is a Class A misdemeanor and, pursuant to KRS 431.005(1)(d), a peace officer may make an arrest without a warrant when such a misdemeanor has been committed in his presence.

Having reviewed the record, including the audiotaped interaction with the police, we conclude that the trial court had ample evidence to support its belief that the officer's actions were reasonable. The evidence supported the trial court's finding that Shannon had created a disturbance in the neighborhood by yelling and cursing loudly so as to cause the neighbors to take notice, a misdemeanor in violation of KRS 525.060.

The evidence also supported the finding that this occurred in the presence of the officers, which, pursuant to KRS 431.005(d)(1), permitted the officers to conduct a warrantless arrest for disorderly conduct. Having had a

reasonable belief that a crime was being committed in their presence, we find nothing inappropriate in the subsequent pursuit and arrest of Shannon by the officers. Accordingly, we affirm the trial court's ruling on that issue.

On appeal to this Court, Shannon now argues that the trial court erred in failing to suppress evidence procured as a result of her unlawful arrest. In support of this assertion, Shannon makes several arguments including: (1) blaming the officers for provoking the incident, (2) that she was "inside her home when she was arrested," (3) that the trial judge failed to take into account that the tip was not verified in any way, shape or form, and (4) that no exigent circumstances existed.

As we have noted, our review of the record indicates that the arguments in the preceding paragraph now made by Shannon were not presented to the court below. Our Kentucky Supreme Court has repeatedly held that it is not at liberty to review alleged errors made with respect to motions to suppress unless the grounds argued for reversal were also argued to the trial court. *See e.g., Henson v. Commonwealth*, 20 S.W.3d 466, 470 (Ky. 2000), and *Todd v. Commonwealth*, 716 S.W.2d 242, 248 (Ky. 1986).

As noted, our review of the record indicates that the only argument Shannon made to the court below concerned whether a person responding to police questioning can be arrested for disorderly conduct when the alleged conduct takes place solely at her residence. In her brief to this Court, Shannon never expressly addresses this issue at all, and instead, addresses the aforementioned issues upon

which the trial court was never given the opportunity to rule. Accordingly, we cannot address those issues now for the first time on appeal.

As her final basis for appeal to this Court, Shannon asserts that the third-degree assault jury instruction failed to require a unanimous verdict as guaranteed by §§ 2, 7, and 11 of the Kentucky Constitution, RCr 9.82(1), and the Fifth and Fourteenth Amendments of the U.S. Constitution. In reviewing this matter, we note that alleged errors regarding jury instructions are considered questions of law and are to be reviewed *de novo* on appeal. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272 (Ky.App. 2006).

The pertinent portion of the instruction at issue provided that Shannon "intentionally caused or attempted to cause physical injury to Officer Steve Smith of the Paducah Police Department by punching and/or striking and/or scratching him in the face and/or head." During the conference on instructions, Shannon's counsel objected to the instruction because it allowed the jury to find that Shannon either caused or attempted to cause physical injury. The trial court overruled the objection.

In support of her argument that the court below erred in allowing an instruction which failed to require a unanimous verdict, Shannon cites *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002), for the proposition that when the Commonwealth presents multiple theories of guilt in one instruction, the evidence must support all of the various theories. Shannon asserts that according to *Whitmore*, if one or more of the theories are not supported by the evidence, then

the criminal defendant's right to a unanimous verdict has been violated. Shannon argues that the evidence does not support that Shannon intentionally attempted to cause physical injury to Officer Smith.

Having reviewed the record and applicable law, we find no merit to Shannon's argument, and decline to reverse on this basis. As our Kentucky Supreme Court previously stated in *Hayes v. Commonwealth*, 625 S.W.2d 583, 584 (Ky. 1981), "An alternative type instruction is proper and non-violative of the unanimity requirement of Section 7 of the Kentucky Constitution if either theory in the instruction is reasonably supported by the evidence."

In the matter *sub judice*, it was the testimony of the officers that Shannon struck Officer Smith. Indeed, the officers testified that Shannon flailed her arms as Officer Smith arrested her, striking him in the face hard enough to draw blood.[11] We find the testimony of the officers to be evidence of a nature substantial enough to support either theory in the instruction. Thus, the trial court did not err in submitting the instruction to the jury.

Accordingly, for the foregoing reasons, we affirm the judgment of the McCracken Circuit Court, the Honorable Robert J. Hines, presiding.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

[11] *See* VR2; 06/28/07; 11:35:15 & 13:33:10-13:34:50.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority's opinion because I believe Shannon's request to *voir dire* on the issue of racial prejudice was improperly denied and constituted an abuse of discretion.

Pursuant to the Fourteenth Amendment, an African-American charged with a capital offense has the right to question prospective jurors regarding racial prejudice. *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). RCr 9.38 provides the same right. *Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky. 2009). I believe that an identical right should be extended to all regardless of the potential penalty. It is the Commonwealth's "duty to protect the innocent as much as . . . prosecute the guilty." *Commonwealth v. Hamilton*, 905 S.W.2d 83, 85 (Ky.App. 1995), citing *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308 (1931).

The fundamental purpose of *voir dire* is to examine each prospective juror's state of mind to enable the trial court to determine actual bias and to permit counsel to discover bias or prejudice. *Shegog v. Commonwealth*, 142 S.W.3d 101, 110 (Ky. 2004); *Wilson v. Commonwealth*, 601 S.W.2d 280, 283 (Ky. 1980). As the U.S. Supreme Court has stated in a landmark case involving the issue of the racial composition of juries, the jury system has occupied a central position in our country by safeguarding a person accused of a crime against the arbitrary exercise of power by a prosecutor or judge. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Despite the constitutional mandate of impartial juries, I am cognizant of the fact that the U.S. Constitution does not always entitle a defendant to engage in *voir dire* questioning regarding all matters that conceivably might prejudice potential jurors against him. *Ristaino v. Ross***,** 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976). Rather, in *Hayes v. Commonwealth*, 175 S.W.3d 574, 583 (Ky. 2005), our Supreme Court stated that the preclusion of a *voir dire* question constitutes reversible error when the question's anticipated response would afford the basis for a peremptory challenge or a challenge for cause.

However, the U.S. Supreme Court recently stated that "'[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.'" *Miller-El v. Dretke*, 545 U.S. 231, 237, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), quoting *Strauder v. West Virginia,* 100 U.S. 303, 309, 25 L.Ed. 664 (1880). This sentiment is widely shared by the American public as evidenced by the results of a survey conducted by the National Center for State Courts, *How the Public Views State Courts*.[12]

In the survey, almost 70 percent of African-Americans respondents believed that African-Americans, as a group, received "somewhat worse" or "far worse" treatment from the courts relative to others. *Id*. at 38. Over forty percent

[12] National Center for State Courts, *How the Public Views the State Courts:* A 1999 Survey (1999), available at http://www.ncsconline.org/WC/Publications/Res_Amt PTC_PublicViewCrts Pub.pdf.

of white respondents felt that African-Americans, as a group, were treated worse by the courts. *Id*. Additionally, while whites were roughly evenly split on whether or not most juries are representative of the community, 70 percent of African-Americans believed that most juries were not representative. *Id*. at 29. While our courts have painstakingly endeavored to prevent the scourge of racial prejudice from infiltrating our system of justice, as the U.S. Supreme Court has recognized and our general public bears witness to, racial prejudice persists both in reality and in perception. Against this background, I examine Shannon's argument regarding *voir dire*.

In this case, the defendant was black, the arresting officers were white, all of the Commonwealth's witnesses were white, defense counsel, the prosecutor and trial judge were white, and the entire venire panel was white. Under these factual circumstances, when the racial disparity of the courtroom was so patently conspicuous, a defendant should be permitted to question the venire on the issue of racial prejudice. Due to the realistic implications of such a disparity, this reasoning has been validated by many of our sister jurisdictions. *Mize v. State*, 131 Ga.App. 538, 206 S.E.2d 530 (Ga.App. 1974); *Matthews v. State*, 276 A.2d 265 (Del. 1971); *Commonwealth v. Holland*, 298 Pa.Super. 289, 292, 444 A.2d 1179, 1181 (Pa.Super. 1982) (denying the reality that racial prejudice exists may prevent a defendant from obtaining a fair trial).

Additionally, providing a defendant with an adequate, not plenary, opportunity to *voir dire* on the issue of racial prejudice will lead to greater public

acceptance of our system of justice and ensure fair treatment for the accused. As the U.S. Supreme Court recognized, when there is widespread cynicism regarding a jury's impartiality, the public confidence in our system of justice is undermined. *Miller-El v. Dretke*, 545 U.S. at 238. Therefore, I believe Shannon's line of *voir dire* questioning would have afforded a basis to challenge prospective jurors. Accordingly, based on the trial court's abuse of discretion in refusing to permit any questions on the issue of racial prejudice, I would vacate Shannon's conviction.

The majority contends that Shannon's *voir dire* claim is unpreserved because her defense counsel failed to ask another specific question regarding racial prejudice. While defense counsel asked only one question, I believe *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), is distinguishable. Unlike in *Lawson*, the trial court strongly rebuked defense counsel's *voir dire* question by stating that race was "not an issue in this case." The trial court further added, "Quit, just quit."

While the majority uses *Lawson* to penalize defense counsel for not *voir diring* further on racial prejudice, it ignores the import of the trial court's vehement repudiation of the defense counsel's attempt to *voir dire* on the issue of racial prejudice. *Preston v. Commonwealth*, 406 S.W.2d 398, 404 (Ky. 1966). While Shannon's defense counsel strongly argued to *voir dire* on the issue of racial prejudice, the trial court's overly strong rejection of this line of questioning silenced counsel. Accordingly, I believe that the trial court's repudiation of defense counsel's attempt at questioning absolved counsel of any failure to *voir dire* further on the issue of racial prejudice.

I would reverse and remand for a new trial.

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