

RENDERED: DECEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001960-MR

SCOTTFORD LEE BRYANT

APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 07-CR-00235

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Scottford Lee Bryant appeals the Barren Circuit Court's judgment convicting him of third-degree rape, third-degree sodomy, and being a first-degree persistent felony offender (PFO-1st). After a careful review of the record, we affirm because the circuit court did not abuse its discretion in failing to strike a juror for cause.

During the *voir dire* portion of Bryant's trial, defense counsel asked the potential jurors whether, in rendering their decision on the case, they would take into account the fact that Bryant chose not to testify on his own behalf. One juror stated that he would wonder why Bryant would not want to explain his side of the story if there was something "wrong." In his appellate brief, Bryant provides a transcript of the discussion between that juror, the attorneys, and the court, and the Commonwealth stated in its appellate brief that it found the transcript to be "sufficient," so the pertinent portions of the transcript, as provided by Bryant, will be reiterated here.

Counsel: OK, so if he did not say anything, would that affect your deliberations as to his guilt or whether he's not guilty?

Juror: I'd hope not.

Counsel: You hope not. You think it might, though? Is there that possibility that it would?

Juror: I guess so (unintelligible) . . .

* * *

Judge: . . . but if you received a specific instruction from the court that said that if he doesn't testify – and we don't know whether he's going to or not. [Defense counsel], I don't think, even knows. But if you received an instruction from the court that said something like he has a right to remain silent you will not allow his not taking the witness stand to enter into your discussions or your deliberations or influence your decision, do you think you could, notwithstanding [how] human nature [would] have [you think] of it, do you think you could follow that instruction?

Juror: Yeah, I hope so.

Judge: Do you have doubts about whether you could or not?

Juror: 1%.

* * *

Commonwealth: Earlier, when I had asked if you could follow the law as far as the elements of the crime, you didn't answer yes or no. I took that to mean yes, on that, that you could follow the law on everything. So, if you were instructed that you were not to take that into consideration, could you do that?

Juror: Yeah, I think so.

Defense counsel moved to strike the juror for cause, but the circuit court denied the motion, reasoning that the juror stated he could follow the law as instructed. The defense then used one of its peremptory strikes to remove that juror from the panel.

Bryant was tried and convicted of third-degree rape, third-degree sodomy, and PFO-1st. His sentences on the rape and sodomy convictions were enhanced, due to his PFO-1st conviction. Consequently, Bryant received a sentence of fifteen years for the third-degree rape conviction and ten years for the third-degree sodomy conviction. Those sentences were ordered to run concurrently, for a total of fifteen years of imprisonment.

Bryant now appeals, contending that the circuit court committed reversible error when it denied his motion to strike the juror for cause after the

juror indicated he would hold Bryant's exercise of his Fifth Amendment right against him.

“The 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.” *Wood v. Commonwealth*, 178 S.W.3d 500, 515-16 (Ky. 2005). Consequently, we review a trial court's decision concerning whether to strike a juror for cause for an abuse of discretion. *See Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007).

The court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor. There is no “magic question” that can rehabilitate a juror as impartiality is not a technical question but a state of mind. . . . When the question is analyzed as to whether the trial court judge abused his discretion, a reviewing court must determine if the trial court had a sound legal basis for his ruling. If a judge errs on a finding of fact, he must be clearly erroneous or there is no error; if error is premised on incorrect application of the law, a judge abuses his discretion when the legal error is so clear that there is no room for the judge to have ruled any differently. RCr¹ 9.36 requires a judge to excuse a juror if there is a reasonable basis to believe the juror cannot be fair and impartial.

Shane, 243 S.W.3d at 338.

“[I]f a trial court abuses its discretion in failing to grant a challenge for cause, and the challenging party uses all of his available peremptory challenges, the trial court's error is grounds for reversal.” *Allen v. Commonwealth*, 276 S.W.3d 768, 773 (Ky. 2008).

¹ Kentucky Rule of Criminal Procedure.

In the present case, the juror in question informed the court that he thought that when he made his decision in the case, he could abide by the court's instruction that he should not consider the fact that Bryant did not testify on his own behalf. Consequently, because the juror told the court that he believed he could obey the court's instructions, the circuit court did not abuse its discretion when it denied Bryant's motion to strike that juror for cause.

Accordingly, the order of the Barren Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent. In my opinion, this case is a perfect example of the use of a "magic question" to drag a "correct" answer from a potential juror. I would reverse for a new trial before a properly constituted jury.

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