

RENDERED: SEPTEMBER 6, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001011-MR

BARRY REEVES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CI-007183

IN-TOWN SUITES LOUISVILLE SOUTH, LLC
AND UNKNOWN DEFENDANT

APPELLEES

AND

NO. 2012-CA-001024-MR

IN-TOWN SUITES LOUISVILLE SOUTH, LLC

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CI-007183

BARRY REEVES AND UNKNOWN DEFENDANT

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Barry Reeves appeals from an Order of the Jefferson Circuit Court denying his Motion for a New Trial or Judgment Notwithstanding the Verdict. Reeves contends that he is entitled to a new trial based on juror misconduct, and argues that the circuit court erred in failing to so rule. He also claims that since he was not aware of the juror misconduct prior to the rendering of the verdict, he cannot be held to have waived the claim of juror misconduct by failing to raise it before the verdict. In the event that Reeves' appeal is successful, In-Town Suites Louisville South, LLC cross-appeals on various issues it alleges to have occurred during the course of the trial. We find no error in the Jefferson Circuit Court's denial of Reeve's motion, and accordingly affirm.

In-Town Suites operates a chain of extended-stay hotel facilities. On August 6, 2008, Barry Reeves and his wife Karen checked in to the In-Town Suites located on Preston Highway in Louisville, Kentucky. Shortly after midnight, Reeves - who had been drinking beer and was highly intoxicated - left his room to look for cigarettes. Reeves would later testify that he remembers walking down some steps, but then experienced a "blackout" and remembers nothing thereafter. Reeves was found unconscious by In-Town Suites employees a few feet away from his room. EMS was summoned, and Reeves was transported to University of

Louisville Hospital where it was determined that he suffered a brain injury. He spent several weeks in the hospital, and was subsequently released.

Reeves filed the instant action in Jefferson Circuit Court against In-Town Suites and an unknown defendant, alleging that he must have been attacked by an unknown assailant and that In-Town Suites was negligent in exercising ordinary care to secure the premises against foreseeable, violent crime. The matter proceeded to trial on January 23, 2012, which resulted in a jury verdict in favor of In-Town Suites.

The record indicates that Karen Reeves travelled out of the Commonwealth shortly after the verdict was rendered. Upon returning about one week later, she contacted Reeve's trial counsel (and appellate counsel herein), and informed him of instances of what she believed was jury misconduct. On one such occasion, she claimed that she was seated in the courtroom when a pregnant, red-haired pharmacist juror looked into the gallery and gave a "thumbs up" signal to an alternate juror. Karen Reeves also reported that one day during the trial, she was having lunch with her husband and his mother at the courthouse when she heard three male jurors laughing and gesturing toward Reeves. According to Ms. Reeves, one of the jurors said, "there ain't nothing wrong with him." Finally, Ms. Reeves claimed that on another occasion during the trial, she and her mother-in-law overheard two female jurors in the hallway discussing the case, when one of the jurors said "this case is nothing but a joke."

On February 27, 2012, the Jefferson Circuit Court rendered its Judgment in favor of In-Town Suites. On March 2, 2012, Reeves, through counsel, filed a Motion for New Trial with supportive affidavits from Barry and Karen Reeves, and Barry's mother Loretta. By way of an Order rendered on May 24, 2012, the circuit court denied the motion. As a basis the denial, the court found that the plaintiff or a family member became aware of each of the alleged incidents complained of during the trial. Rather than raising these issues when the court had the opportunity to make an inquiry of the jurors or otherwise investigate the matter, the plaintiff and his family waited weeks after the adverse verdict to raise the allegation. The court found as distinguishable the case law presented by the plaintiff on this issue, and accordingly denied the Motion for a New Trial. This appeal followed.

Reeves now argues that the Jefferson Circuit Court erred in failing to order a new trial based on juror misconduct. After directing our attention to CR 59.01, which allows for a new trial based on juror misconduct, Reeves points to case law which he maintains is supportive of the notion that juror misconduct can be reported after the trial has ended yet still justify a new trial. He argues that the conduct complained of is of the type which has typically resulted in new trials, and cites to several instances where juror misconduct has resulted in a new trial. Reeves also notes that the Appellee has not rebutted his claims of having witnessed juror misconduct, instead only arguing that the videotaped trial proceeding shows no such misconduct. Finally, Reeves argues that the alleged "thumbs up"

communication between the pregnant, red-haired pharmacist juror and an alternate juror demonstrates that the juror and Mr. Young discussed the case and that a verdict in favor of In-Town Suites was their desired outcome. In sum, Reeves argues that the affidavits in support of the motion were sufficient to warrant a new trial, and that the Jefferson Circuit Court erred in failing to so rule.

CR 59.01 provides that,

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

(b) Misconduct of the jury, of the prevailing party, or of his attorney[.]

Reeves, through counsel, alleged three instances of juror misconduct. In the first such instance, he contends that a red haired, pregnant pharmacist juror gave a “thumbs up” sign to an alternate juror upon returning to the courtroom and before the reading of the verdict. The purpose and intent of the “thumbs up” sign, if any, is so speculative and vague as to be meaningless. It could have meant “the trial is over” or any number of things, but we will never know as it was not raised by Reeves, his family members or counsel. The second instance of juror misconduct allegedly occurred when Reeves, his wife and mother were having lunch at the courthouse and heard three male jurors laughing and gesturing, when one allegedly

said “ain’t nothing wrong with him.” In this instance, Reeves was present, yet either did not raise this issue with his counsel, or if he did it was not raised before the court. Additionally, the identities of these alleged jurors are unknown, and Reeves did not raise the issue in a timely manner which would have allowed the court to conduct an inquiry.

Lastly, Reeve’s wife alleged that she and her mother-in-law heard one of two female jurors in a hallway say “this ain’t nothing but a joke.” Reeves’ counsel argues that Karen Reeves’ failure to bring this to his attention cannot be imputed to him or to Reeves, as it is not his fault nor that of Reeves that Karen Reeves did not communicate this incident to him. We find persuasive his contention that Karen Reeves’ failure to make known the alleged juror misconduct in a timely fashion cannot be imputed to Reeves or his counsel. Nevertheless, the fact remains that Reeves and his wife tendered affidavits on these claims to counsel *before* the Judgment was rendered, but did not move for a new trial or otherwise raise these claims until after the Judgment.

The decision whether to grant a new trial lies within the sound discretion of the trial court, and is presumptively correct. *Shortridge v. Rice*, 929 S.W.2d 194 (Ky. App. 1996). We may reverse the trial court’s denial of a motion for a new trial only upon concluding that the ruling was clearly erroneous. *Id.* The question for our consideration, then, is whether Judge Stevens’ denial of Reeves’ motion - the denial being grounded primarily on Reeves’ delay in raising the claim of juror misconduct - was clearly erroneous.

In considering this issue, we are guided in large part by *Leslie v. Egerton*, 445 S.W.2d 116 (Ky. 1969), which is factually similar to the matter before us. In *Leslie*, a juror allegedly engaged in misconduct by stating at a restaurant that the plaintiff “would get plenty out of this case”. The allegation was not made known to the court until approximately 11 days later, and after the jury had returned a verdict and a judgment was rendered. In sustaining the trial court’s denial of the motion for a new trial, the Kentucky Supreme Court reiterated its intolerance of juror misconduct in any form. (“[I]t is imperative that no vestige of suspicion of improper conduct by jurors be tolerated.” *Id.* at 118). However, it juxtaposed its intolerance of alleged juror misconduct with the overarching requirement that the trial verdict and judgment be given effect and not quashed merely on an untimely and unsupported allegation of the losing party. In balancing the components of a fair trial, the court concluded that the aggrieved party should have raised the claim of juror misconduct in a timely manner so that it could have been addressed before the verdict and prior to the release of the jury. It noted that had the claim been raised when the aggrieved party had first been made of aware of it, the court could have fully investigated the allegation of juror misconduct and taken any necessary corrective action. However, because of the delay in raising the allegations - which was completely within the control of the aggrieved party - it was impossible to take corrective action prior to the return of the verdict and the jury’s dismissal. Additionally, the court took into account the unsupported and self-serving nature of the claim.

In the matter at bar, the trial was conducted between January 23, 2012, and January 27, 2012. Reeves was present each day during the trial, and according to the record, his wife and mother were present the final two days. Though each of the three instances of alleged jury misconduct were made prior to the entry of the verdict, Reeves did not tender the Motion for a New Trial until March 2, 2012, or more than one month after the conclusion of the trial. Additionally, the purported “thumbs up” communication between the juror and alternate juror was made after the jury had reached its verdict, and therefore it could not have affected the verdict. While we, like the Kentucky Supreme Court, cannot tolerate alleged juror misconduct in any form, we must also balance that imperative with the parties’ right to due process, the administration of justice, the parties’ right to rely on the verdict, the nature and substance of the claims of misconduct, and the timeliness of those claims. *Leslie, supra*. In so doing, we cannot conclude that Reeves has overcome the presumption that the Jefferson Circuit Court’s denial of his motion was correct, nor that the ruling was clearly erroneous. *Shortridge, supra*. Though he could have done so, Reeves did not raise the instant allegations until after the verdict had been rendered, an adverse result realized, and the jury dismissed. It was largely or wholly upon this basis that the Jefferson Circuit Court denied his request for a new trial, and we cannot conclude that this decision was clearly erroneous.

Ultimately, Reeves had duty to report the instance of alleged juror misconduct which occurred at lunch, as he was present at that occurrence. He did

not do so until after the verdict was returned, the jury was released and the Judgment rendered. As to the two other instances - the “thumbs up” gesture and the two female jurors in the hallway - the claims of misconduct are both untimely and insufficiently specific to demonstrate that the Jefferson Circuit Court’s denial of Reeves’ motion was clearly erroneous. The “thumbs up” gesture could have meant anything or nothing, and the two female jurors in the hallway were never identified and were released from service some 18 months ago. While these claims likely would have been investigated by the court if raised in a timely manner, when the totality of the circumstances is considered, including the vagueness and untimeliness of the allegations, and Reeves’ failure to raise the instance of alleged misconduct at which he was present, we cannot conclude that the Jefferson Circuit Court abused its discretion in denying Reeves’ motion for a new trial. Accordingly, we find no error. We hold as moot In-Town Suites’ cross-appeal, wherein it asserted cross-examination and evidentiary issues in the event there was a retrial of Reeves’ underlying cause of action.

For the foregoing reasons, we affirm the Order of the Jefferson Circuit Court denying Reeves’ Motion for a New Trial or Judgment Notwithstanding the Verdict.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT/CROSS
APPELLEE BARRY REEVES:

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Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT IN-TOWN SUITES:

Donald Killian Brown
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ORAL ARGUMENT FOR
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