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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001961-MR

CLARENCE ROGERS — APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 13-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2013-CA-001962-MR

AMANDA MAY — APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 13-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Clarence Rogers brings Appeal No. 2013-CA-001961-MR from a November 7, 2013, Final Judgment of the Harrison Circuit Court imposing a one-year sentence of imprisonment, and Amanda May brings Appeal No. 2013-CA-001962-MR from a November 7, 2013, Final Judgment of the Harrison Circuit Court imposing a one-year sentence of imprisonment. We affirm Appeal No. 2013-CA-001961-MR and Appeal No. 2013-CA-001962-MR.

In May 2013, Rogers and May were separately indicted upon one count each of receiving stolen property (valued over $500 but less than $10,000). Kentucky Revised Statutes (KRS) 514.110(3)(a). It was alleged that Rogers and May unlawfully received and disposed of four black angus cows. The cows were owned by Gary Daniel and were stolen from his farm in March 2013.

Rogers's and May's indictments were joined and consolidated for trial by jury. During the trial, evidence was conflicting upon Rogers and May's guilt. The Commonwealth introduced testimony that Rogers and May knowingly transported the stolen cows to a slaughterhouse whereupon May received a check from the slaughterhouse in the amount $3,995.74. May then deposited the check into her checking account at a local bank. Conversely, Rogers and May testified that Matthew Edmondson, Jr., approached them and asked if they would transport

the four angus cows to the slaughterhouse. According to Rogers and May, they were unaware that Edmondson had stolen the cows from Daniel because Edmondson claimed the cows belonged to him.[1] The jury ultimately found both Rogers and May guilty of one count of receiving stolen property (valued over $500 but less than $10,000). The circuit court sentenced each of them to one year of imprisonment by final judgments entered November 7, 2013. This appeal follows.

Rogers and May filed separate appellate briefs, but the arguments contained therein are identical. Therefore, we will address both appeals simultaneously.

Appeal Nos. 2013-CA-001961-MR and 2013-CA-001962-MR

Appellants initially contend that the circuit court committed reversible error by failing to strike a juror for cause. Appellants believe that Juror 125 demonstrated she could not render a fair and impartial verdict, and the circuit court erred by denying their motion to strike Juror 125 for cause.

During *voir dire*, the Commonwealth introduced their witnesses to the potential jurors; they included Gary Daniel and Joe Trailor. Juror 125 stated that she was a neighbor of both Daniel and Trailor and that she was friends with all her neighbors. Juror 125 also conceded that she would possibly give more weight to the testimony of Daniel and Trailor and was unsure if she could refrain from so doing. Juror 125 additionally stated that Daniel and Trailor were good people who

[1] Amanda May testified that she deposited the check from the slaughterhouse into her checking account because Matthew Edmondson, Jr., represented to her that he did not have a checking account.

would not be untruthful. Appellants moved to strike Juror 125 for cause, and the circuit court denied the motion. Appellants then utilized a peremptory challenge to remove Juror 125.

Kentucky Rules of Criminal Procedure (RCr) 9.36 provides "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Generally, the circuit court enjoys discretion to determine if a potential juror is incapable of rendering a fair and impartial verdict and should be stricken for cause. This discretion will not be reversed on appeal except for an abuse thereof. *Grubb v. Norton Hospitals, Inc.*, 401 S.W.3d 483 (Ky. 2013).

To properly preserve the denial of a motion to strike a juror for cause, the moving party must take the following three steps:

> (1) at the time peremptory challenges are exercised, the moving party uses a peremptory challenge on the juror whom the trial court refused to remove for cause, (2) the moving party lists on the jury strike sheet (Form AOC-013) or states on the record the name of another member of the jury panel the moving party would have removed by peremptory challenge if the motion to strike for cause had been granted, and (3) the other panel member who would have been struck peremptorily is selected to sit on the jury, such that the error cannot be considered harmless. . . .

7 Kurt A. Philipps, Jr., David V. Kramer & David W. Burleigh, *Kentucky Practice – Rules of Civil Procedure* Rule 47.03 (2015).

In these appeals, appellants concede that they failed to indicate on the record the identity of a potential juror they would have removed but could not do so due

to their peremptory challenges having been exhausted. Appellants argue that the circuit court's erroneous denial of the motion to strike Juror 125 for cause impacts their substantial rights and constitutes reversible error. Appellants also request this Court to review the error under the palpable error rule found in RCr 10.26.

We view *McDaniel v. Commonwealth*, 415 S.W.3d 643 (Ky. 2013), as dispositive herein. In *McDaniel*, the defendant argued that the circuit court committed reversible error by failing to strike three jurors for cause and thereby forcing the use of three peremptory challenges. McDaniel did not preserve the issue for appeal by identifying the juror(s) who improperly sat on the jury because he exhausted his peremptory challenges. The Supreme Court reasoned that no palpable error could have resulted because no juror actually sat on the jury that appellant would have stricken therefrom:

> Appellant concedes that he failed to properly preserve the issue but requests our review for palpable error under RCr 10.26; KRE 103. Under the palpable error standard, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. "[W]hat a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky.2006)* (citations omitted).
>
> Appellant alleges that the trial court should have excluded jurors 63, 94, and 120 because each of them indicated in voir dire that they would give greater weight to a police officer's testimony than a layperson's. A

> thorough examination of the alleged biases of the three prospective jurors is unnecessary because each juror was eventually peremptorily struck by Appellant; therefore, there is not a "substantial possibility" that these particular jurors' biases affected the result in the case as is required for a finding of palpable error. *Id.* The erroneous deprivation of a peremptory challenge can only affect the result of a case if another juror the defendant would have used a peremptory strike on is impaneled to the jury. *See Gabbard,* 297 S.W.3d at 854 (citing *King v. Commonwealth,* 276 S.W.3d 270, 279 (Ky.2009)) (explaining that a trial court's erroneous failure to grant a strike for cause is non-prejudicial if no other juror the defendant would have used a strike on actually sits on the jury). If Appellant does not both exhaust his peremptory strikes and assert that he would have used one of his forfeited peremptory strikes on another prospective juror who actually sat on the jury, "there can be no reversible error because the 'Appellant received the jury he wanted,' and any error [was] 'effectively cured.'" *Id.* Because Appellant has failed to assert that he would have peremptorily struck another prospective juror, this issue was not preserved; and because none of the challenged jurors sat on the jury there is no basis for a finding of palpable error.

McDaniel, 415 S.W.3d at 649-50.

In this case, appellants failed to identify a prospective juror they would have peremptorily stricken; consequently, we conclude that appellants did not preserve the issue for appellate review and that no palpable error resulted as no challenged juror sat on the jury. *See McDaniel*, 415 S.W.3d 643.

Appellants next assert that the circuit court erred by not probating their respective one-year sentences of imprisonment. Appellants allege that the circuit court denied probation "solely based on [appellants'] decision to exercise their constitutional right to a jury trial." Appellants' Briefs at 21-22. Appellants claim

that the circuit court's decision to deny probation was impermissibly based upon the jury's recommended sentence of one year of imprisonment rather than the factors set forth in KRS 533.010(2).

As a general rule, a circuit court is statutorily mandated to consider probation before imposing a sentence of imprisonment.[2] KRS 533.010. When so doing, the circuit court is instructed:

> (2) . . . [A]fter due consideration of the defendant's risk and needs assessment, nature and circumstances of the crime, and the history, character, and condition of the defendant, probation or conditional discharge shall be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:
>
> (a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;
>
> (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or
>
> (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

And, the decision to grant probation is within the discretion of the circuit court and will only be reversed where an abuse of discretion is demonstrated. *Aviles v. Commonwealth*, 17 S.W.3d 534 (Ky. App. 2000).

The record in this case clearly demonstrates that the circuit court considered the jury's recommended sentence of imprisonment but also considered the relevant

[2] There are exceptions to this general rule, as where defendant is sentenced to death.

statutory factors before deciding to deny appellants' probation. In fact, in its final judgments, the circuit court specifically found:[3]

> Having given due consideration to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

As is evident from its final judgments, the circuit court considered the nature of the crime as well as the criminal history and character of appellants. In the end, the circuit court believed that probation was unwarranted because it would depreciate the seriousness of the crimes. Upon the whole, we cannot conclude that the circuit court abused its discretion by denying appellants' probation.

Appellants also maintain that the circuit court erred by denying their motion for mistrial. Specifically, appellants claim that a witness for the Commonwealth, Edmondson, testified that May "had been in trouble in the past." Appellants' Briefs at 22. Appellants orally moved for a mistrial, but the circuit court denied same. Appellants concede that no request for a jury admonition was contemporaneously made to the circuit court. In its brief, the Commonwealth sets forth in detail Edmondson's trial testimony at issue:

> Leading up to Edmondson's statement, the Commonwealth asked Edmondson "At any point in time, did Clarence Rogers ever ask you if you would 'take the blame?' (VR, 10/22/13, 2:48:31). Edmondson said that

[3] The same findings were included in the final judgment imposing sentence on Amanda May and the final judgment imposing sentence on Clarence Rogers.

> he had (Id.). The Commonwealth then asked Edmondson "When you hear 'take the blame,' is that, was that meaning that you did it and they weren't involved?" (VR, 10/22/13, 2:48:44). Edmondson then answered "No sir, it was just, I was, my father has been in and prison [sic] so I know what it's like to not have parents. And like I said, we was really close to them, and Amanda had been in trouble before and I had never been in trouble." (VR, 10/22/13, 2:49:03).

Commonwealth's Brief at 12.

It is well-recognized that a mistrial is an "extreme remedy" available only "when a fundamental defect in the proceedings has rendered a fair trial manifestly impossible." *Jacobsen v. Commonwealth*, 376 S.W.3d 600, 609 (Ky. 2012). As to inadmissible testimony regarding prior bad acts of a defendant, a mistrial is generally not warranted as it is presumed that the jury will follow an admonition to disregard the testimony. *Jacobsen*, 376 S.W.3d 600. There are, however, recognized two exceptions:

> (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant . . . or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Jacobsen, 376 S.W.3d at 610.

In our case, Edmondson's testimony that May had been in trouble in the past was inadmissible per Kentucky Rules of Evidence 404(b). However, it is presumed that the jury would have followed an admonition by the circuit court to disregard such testimony if appellants had requested the admonition. *See*

Jacobsen, 376 S.W.3d 600. And, neither exception applies as Edmondson's vague reference to May's past criminal trouble was neither devastating nor highly prejudicial. Consequently, we are of the opinion that the circuit court did not commit error by denying appellants' motion for mistrial.

For the foregoing reasons the Final Judgments of the Harrison Circuit Court is affirmed in Appeal No. 2013-CA-001961-MR and affirmed in Appeal No. 2013-CA-001962-MR.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS CLARENCE ROGERS AND AMANDA MAY:

Robin R. Slater
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky