

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000168-MR

RICKEY LEE DUKE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HON. THOMAS L. CLARK, JUDGE  
INDICTMENT NO. 15-CR-01077

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Rickey Lee Duke appeals from the Fayette Circuit Court's final judgment and sentence of imprisonment entered January 20, 2016.

Discerning no error, we affirm.

In July 2012, Duke resided with his wife, Doralease, and their five children in Lexington, Kentucky, when his oldest daughter, T.D., told her mother Duke had touched her breasts on two separate occasions. T.D. was thirteen years

old at the time of these two incidents. She also recounted an incident from October 31, 2011, in which Duke began running his hand up her leg toward her privates while she was watching television with him. Doralease immediately confronted Duke about these allegations. Duke denied deliberately touching T.D., saying the touching occurred accidentally during incidents of horseplay. Doralease did not accept his explanation. She took her children away from the home to stay with relatives and afterward reported the allegations to police.

Following an investigation by the Lexington Police Department, Duke was indicted on three counts of first-degree sexual abuse.<sup>1</sup> Count one of the indictment, based upon the October 31, 2011, incident, was later amended to attempted first-degree sexual abuse.<sup>2</sup> The circuit court set Duke's trial date for November 18, 2014, but he failed to appear. As a result, Duke was also charged with first-degree bail jumping.<sup>3</sup> After remaining at large for approximately four months, he was apprehended in Hopkinsville and transported back to Lexington. Following a one-day trial on November 10, 2015, the jury acquitted Duke of attempted sexual abuse, but convicted him on two counts of sexual abuse and bail jumping. The circuit court thereafter sentenced Duke in accord with the jury recommendation of five years' imprisonment for each count of sexual abuse,

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<sup>1</sup> Kentucky Revised Statutes (KRS) 510.110, a Class D felony.

<sup>2</sup> KRS 506.010(4)(d) provides being charged with criminal attempt of a Class D felony (in this case, first-degree sexual abuse) is a Class A misdemeanor.

<sup>3</sup> KRS 520.070, a Class D felony. The superseding indictment also charged Duke with being a persistent felony offender, but that charge was later dismissed.

served concurrently and one year imprisonment for bail jumping, served consecutively to his other charges. This appeal follows.

Duke presents two issues on appeal. First, he contends the trial court erred by striking a juror for cause over his objection. A juror approached the bench during *voir dire* and explained she herself was a rape victim. However, she also explained her brother had been accused of sexual abuse and was convicted at trial, but the conviction was subsequently overturned on appeal. She told the court she believed the police had manipulated the crime scene and the prosecutor had coached the victim on what to say during her brother's trial. When asked if she felt her brother had been treated fairly by the system, she replied, "Absolutely not." During this bench conference, the juror was asked whether she could listen and be fair to both sides, and she stated her belief she could. The Commonwealth nonetheless moved to strike the juror for cause, and the court agreed to do so, stating the juror "expressed some degree of predetermination on the matter."

"A trial court's decision on whether to strike a juror is reviewed for a clear abuse of discretion." *Basham v. Commonwealth*, 455 S.W.3d 415, 420 (Ky. 2014). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Brewer v. Commonwealth*, 206 S.W.3d 313, 320 (Ky. 2006) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Duke contends the exclusion of this juror violated his right to an impartial jury. However,

when a trial court *strikes* a juror for cause, there is little for a defendant to complain about except that, as here, the juror possibly held views favorable to an acquittal. This clearly denotes bias *for* a defendant, and is equally as unfair as seating a juror biased *against* the defendant. Consequently, striking a juror for cause would have to be an abuse of discretion tantamount to some kind of systematic exclusion, such as for race, in order to be reversible.

*Basham*, 455 S.W.3d at 421.

Contrary to Duke’s position, the Supreme Court of Kentucky has “repeatedly *encouraged* trial courts to strike a juror when a reasonable person would question whether the juror would be fair[.]” *Id.* (emphasis added). Inclusion or exclusion of a particular juror is not as critical as maintaining the integrity of the trial. “[W]hen there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken.” *Id.* (quoting *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013)). In addition, nothing in the record indicates “an abuse of discretion tantamount to some kind of systematic exclusion.” *Id.* The circuit court manifested some doubt as to whether the stricken juror could truly act impartially, based upon her statements at the bench conference, and thus, striking the juror for cause was appropriate. “By erring on the side of caution and striking [the juror], the trial court preserved the integrity of the trial. The trial court made it fair for *both* the defendant and the Commonwealth. This was clearly not a systematic exclusion. There was no abuse of discretion.” *Id.*

Next, Duke contends the trial court erred by denying his motion to sever his bail jumping charge from the sexual abuse charges, thus subjecting him to undue prejudice at trial.

Kentucky Rules of Criminal Procedure (RCr) 6.18 permits joinder of offenses in a single indictment if the offenses are (1) of the same or similar character or (2) based on the same acts or transactions connected together or constituting parts of a common scheme or plan. But RCr 9.16<sup>4</sup> permits a court to order separate trials of the counts of an indictment upon motion and a showing of prejudice. RCr 9.16 applies when the requirements of RCr 6.18 are satisfied in that joinder could be proper but would be prejudicial.

*Cohron v. Commonwealth*, 306 S.W.3d 489, 493 (Ky. 2010) (citing *Sebastian v. Commonwealth*, 623 S.W.2d 880, 881 (Ky. 1981)). “Under RCr 9.16 [now RCr 8.31] a defendant must prove that joinder would be so prejudicial as to be unfair or unnecessarily or unreasonably hurtful.” *Elam v. Commonwealth*, 500 S.W.3d 818, 822 (Ky. 2016) (quoting *Ratliff v. Commonwealth*, 194 S.W.3d 258, 264 (Ky. 2006)).

Whether the prejudicial effect of an otherwise proper joinder of offenses meets the “unfair or unnecessarily or unreasonably hurtful” threshold is a matter that rests with the sound discretion of the trial judge. A trial judge has broad discretion in ruling on an RCr 9.16 [now RCr 8.31] motion, and that determination will not be overturned on appeal unless an abuse of discretion is shown. We will not overturn a trial court’s joinder determination absent a showing of actual prejudice and a clear abuse of discretion. We must be clearly convinced that prejudice

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<sup>4</sup> RCr 9.16, “Separate Trials,” has been deleted by Order 2014-22, eff. 1-1-15, as this rule has been shifted to RCr 8.31 “Separate Trials.” As of this writing, the language used in the new rule is identical to that of the old.

occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge that the refusal to grant a severance was an abuse of discretion.

*Id.* at 822-23 (citations and internal quotation marks omitted). “Joinder of different offenses requires ‘a sufficient nexus between or among them to justify a single trial.’” *Id.* at 823 (quoting *Peacher v. Commonwealth*, 391 S.W.3d 821, 837 (Ky. 2013)). “[T]he required nexus [arises] from a ‘logical’ relationship between them, some indication that they arose one from the other or otherwise in the course of a single act or transaction, or that they both arose as parts of a common scheme or plan.” *Id.* “The primary test for determining if the consolidation of different crimes for a single trial creates undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other.” *Id.* at 824 (quoting *Roark v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002)).

Here, the circuit court denied Duke’s motion to sever the bail jumping charge on grounds that evidence of flight is relevant and admissible to Duke’s underlying charge. “[E]vidence of flight is admissible because it has a tendency to make the existence of the defendant’s guilt more probable: a guilty person probably would act like a guilty person.” *Jackson v. Commonwealth*, 199 S.W.3d 763, 764 (Ky. App. 2006) (quoting *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 219 (Ky. 2003)). In *Elam*, our Supreme Court found a charge of witness tampering would be admissible in a separate trial for sexual offenses, *because the act indicated consciousness of guilt*. *Elam*, 500 S.W.3d at 824 (citing *Tamme v. Commonwealth*, 973 S.W.2d 13, 29-30 (Ky. 1998)) (emphasis added).

Based on these considerations, we agree Duke’s bail jumping charge would be admissible evidence of flight in a separate trial on his sexual abuse charges, because it indicated consciousness of guilt. Conversely, in a trial for bail jumping, the underlying sexual abuse charges—being inextricably intertwined—would be admissible. Duke failed to appear on the day of his trial for the sexual abuse charges, and did not reappear before the court until he was apprehended in another county four months later. There is a sufficient logical nexus between the offenses to justify a joint trial, as they “arose one from the other.” *Id.* at 823 (quoting *Peacher*, 391 S.W.3d at 837). Based upon these factors, there was no undue prejudice to Duke by trying him on all charges, and therefore no abuse of discretion in the circuit court’s denial of Duke’s motion to sever the bail jumping charge.

For the foregoing reasons, we affirm the Fayette Circuit Court.

ALL CONCUR.

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