

RENDERED: OCTOBER 13, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2016-CA-000709-MR

TERRANCE ARMSTRONG

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE KATHLEEN LAPE, JUDGE  
ACTION NO. 14-CR-00088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING & REMANDING

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BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

MAZE, JUDGE: Terrance Armstrong appeals the judgment of the Kenton Circuit Court convicting him of one count of fourth-degree assault and sentencing him to twelve months' confinement in the county jail and a \$500 fine. The issue presented on appeal is whether Armstrong was denied his right, under the Confrontation Clause of the Constitution, to introduce the parole status of a Commonwealth's witness in order to show bias and motive. The trial court ruled

that KRE<sup>1</sup> 609 prohibited questioning the witness regarding his parole status. We find differently for reasons set forth below. We vacate the conviction of the Appellant, reverse the ruling of the trial court as to the objection at issue, and remand the case to the Kenton Circuit Court for a new trial consistent with this opinion.

### BACKGROUND

Covington police officers, responding to a call reporting an assault with possible injuries, discovered Harry Stewart lying on the ground severely injured and surrounded by several bystanders. Stewart was later diagnosed with a jaw fracture, a lacerated tongue, and swelling of the face in addition to a loss of consciousness. He could not recall the incident following his recovery.

After interviewing some of the bystanders, police identified Armstrong as a suspect in causing the injuries. Shortly thereafter, Armstrong was arrested at his friend Kendu's nearby apartment. He was later indicted by a Kenton County grand jury and charged with second-degree assault. A superseding indictment charged Armstrong with first-degree assault and the matter proceeded to trial.

Nearly every other detail was disputed at trial. John Flynn—one of Stewart's friends, and the only eyewitness to testify for the prosecution—testified

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<sup>1</sup> Kentucky Rules of Evidence.

that Armstrong attacked Stewart unprovoked. Flynn was standing on the street with Stewart and Stewart's brother Richard. All three men are white. Flynn says that Armstrong, who is black, approached, stood in the middle of them, and said, "We have a problem." In response, Richard reached behind his back and told Armstrong he would "cut his heart out." Meanwhile, Stewart pulled out his cell phone and attempted to call the police. Seeing this, Armstrong punched Stewart in the face, causing Stewart to immediately fall to the ground. Stewart was able to stand again but was hit with a soda can and two more punches before falling to the ground a second time. Flynn and Richard ran away from the altercation and Armstrong continued to hit Stewart several times while Stewart lay on the ground. Flynn testified that a "taller black guy" chased Richard from the scene.

The defense told a different story. According to Armstrong, he and his friends Kevin Webster and Keela Butler, both of whom are also black, were going to their friend Spencer's apartment. When Kevin and Keela stopped to speak with an acquaintance who was walking his dog, Armstrong continued on to Spencer's apartment to let him know that they had arrived. When Spencer did not answer, Armstrong walked to the curb to listen to music on his phone while he waited.

Armstrong testified that while he waited, Flynn, Richard, and Stewart approached him and one of them said, "Get the f\*\*\* out of here, n\*\*\*\*\*, before

we stab you up.” Taken by surprise, he says that he stood his ground. One of the men pulled a knife. Armstrong said that he swung twice at the first man to come within reach of him, which was Stewart, and that Stewart fell immediately to the ground. The other two white men backed up as Kevin Webster ran to Armstrong’s aid. Webster chased Richard from the scene as Armstrong chased after Flynn. Apparently unable to catch Flynn, Armstrong went to Kendu’s apartment where he was arrested. Kevin Webster testified that he did not chase anyone.

The jury was left with two competing and wildly differing narratives from which to determine the facts of the matter. The jury was asked to find Armstrong guilty of first, second, or fourth-degree assault, or find him not guilty. The jury was also asked to determine whether Armstrong’s assault on Stewart was justified by self-defense. It is apparent that Armstrong admitted to the elements of fourth-degree assault by admitting to punching Stewart, and this is one of the few points on which both Flynn and Armstrong’s accounts agree. The jury found Armstrong guilty of fourth-degree assault and did not recognize any privilege of self-defense.

When cross-examining Flynn, defense counsel sought to impeach Flynn’s credibility by asking him, “Are you on parole for life for murdering a black man?” Before Flynn could answer, the Commonwealth objected and requested a mistrial, or in the alternative, an admonishment. Thereafter, the trial

judge excused the jury to allow the parties to argue their positions outside of its presence. After hearing arguments from counsel and reviewing relevant case law and rules of evidence, the trial court held KRE 609 disallowed the question. The court denied the Commonwealth's request for a mistrial, however it granted the Commonwealth's request to admonish the jury. Thereafter, defense counsel requested and was permitted to preserve the testimony by avowal.

On avowal, Flynn admitted that in 1983, he and three others robbed two black victims and stabbed one of the victims to death. He testified he was sentenced to life imprisonment for the crime and was currently on parole. Flynn denied, however, that the 1983 crime was racially motivated. He agreed that a parole violation would return him to prison to serve out his life sentence. Armstrong contends that Flynn had motivation to lie because his possession of a knife would be a violation of his parole, he also contended that Flynn is biased against black people and that the 1983 crime is evidence of his bias.

#### ANALYSIS

Armstrong's sole argument on appeal is that the trial court violated his Sixth and Fourteenth Amendment rights when it improperly limited the scope of his cross-examination of Flynn. Specifically, Armstrong asserts that he should

have been permitted to ask Flynn whether he was currently on lifetime parole.<sup>2</sup>

Armstrong argues that by prohibiting him from asking whether Flynn was on parole, the trial court prevented him from establishing that Flynn had bias, interest, or motive to testify in a particular manner.

We review a trial court's decision to limit cross-examination under an abuse of discretion standard. *Nunn v. Commonwealth*, 896 S.W.2d 911, 914 (Ky. 1995). An abuse of discretion occurs when the trial court's decision is not supported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a defendant the right to cross-examine witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934, 937 (1965). During the cross-examination of a witness, the cross-examiner is not only permitted to delve into the witness's story to test the witness's perceptions and memory, he is also permitted to discredit the witness's testimony. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

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<sup>2</sup> Armstrong only argues that he should have been permitted to ask if Flynn was on "lifetime parole." He does not argue, as he did in the trial court, that he should have been permitted to ask if Flynn was on parole "for murdering a black man." He does allude to the later argument in his reply brief. However, we have not abandoned this Court's long-standing rule that new issues cannot be raised for the first time in an appellant's reply brief. *Milby v. Mears*, 580 S.W. 2d 724, 728 (Ky. App. 1979). Accordingly, we will not address whether Armstrong should have been permitted to ask about Flynn's specific crime and the race of his victim.

Two methods by which defense counsel may discredit a witness's testimony on cross-examination are by introducing a prior criminal conviction and by exposing the witness's motive, bias, or interest to testify. *Id.* Introducing a prior criminal conviction permits the jury to infer that, based on the witness's character, he is less likely than the average citizen to provide truthful testimony. *Id.* See also KRE 609.<sup>3</sup> This is, therefore, a general attack on a witness's credibility. *Id.* On the other hand, exposing a witness's motive, bias, or interest to testify is a more specific attack because the cross-examination is aimed at revealing issues that "may relate directly to [the] issues or personalities in the case at hand." *Id.* See also KRE 611 (b).<sup>4</sup>

It is true that a trial court has considerable discretion in determining the scope and subject of cross-examination. "A trial judge is not divested of his

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<sup>3</sup> KRE 609 (a) reads:

For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

<sup>4</sup> KRE 611(b) reads: "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination."

authority or discretion simply because the proposed evidence could possibly pertain to bias.” *Holt v. Commonwealth*, 250 S.W.3d 647, 653 (Ky. 2008). A defendant does not have a right to “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986). “So long as a reasonably complete picture of the witness’ veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.” *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).

However, it is undisputed that “[t]he partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.” *Davis*, 415 U.S. at 316. The Kentucky Supreme Court in *Derossett v. Commonwealth of Kentucky*, 867 S.W.2d 195, 198 (Ky. 1993) explained that “KRE 611 provides that a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. . . therefore, KRE 611 embodies the ‘wide open’ rule of cross-examination by allowing questioning as to any matter *relevant* to any issue in the case, subject to judicial discretion . . . .” Additionally, “[w]henver limitations on the right of cross-examination are analyzed, it should be remembered that the right implicated is a fundamental constitutional right and that such limitations should be cautiously applied.” *Maddox*, 955 S.W.2d at 720.



The “burden espoused in *Van Arsdall* is whether a ‘reasonable jury might have received a significantly different impression of [the witness’s] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination.” *Davenport v. Commonwealth*, 177 S.W.3d 763 (Ky. 2005), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). The fact that Flynn was on lifetime parole and that possession of a knife could have resulted in him returning to prison to serve out his life sentence, likely would have caused a reasonable jury to have a different impression of his credibility than only knowing he was a friend of the victim.

We have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently and beyond a reasonable doubt say that a constitutional error was harmless in its effect on the fact-finding process at trial. *Van Arsdall*, 475 U.S. at 681. However, in this case we cannot say beyond a reasonable doubt that the jury’s fact-finding was not affected by this avowal testimony being removed from their consideration. The jury did not have a reasonably complete picture of the witness’s veracity, bias, and motivation.

Here, the trial court held that, pursuant to KRE 609, Armstrong’s defense counsel was only permitted to ask Flynn whether he was convicted of a felony and not whether he was currently on parole for that felony or the details of

that felony. We agree with the trial court that the questioning was not permitted under KRE 609 as the rule prohibits evidence of a conviction which is more than ten years old, unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect. Furthermore, if the witness admits to the fact of the prior conviction, the identity or facts of the conviction may not be disclosed on cross-examination. However, the question pertaining to his lifetime parole status was permitted under KRE 611 to ensure that the jury had a complete picture of the witness.

As the Supreme Court of Kentucky has made clear, “[t]he fact that the veracity of a witness may not be impeached by proof of prior convictions not involving dishonesty is not a sufficient reason to deny a defendant the right to show potential bias of a witness which a juror might infer from the fact that the witness was on parole under active supervision.” *Adcock v. Commonwealth*, 702 S.W.2d 440, 441 (Ky. 1986). While the fact that Flynn was a convicted felon may have shown a general lack of credibility, the fact that he was on parole, and possession of a knife would violate his parole, offered a more specific reason Flynn would possibly lie in this particular case.

## CONCLUSION

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it, but we do conclude that the jurors were entitled

to have the benefit of the defense theory before them so that they could make an informed judgment. . . .

*Davis*, 415 U.S. at 317.

The jury should have been allowed to determine whether Flynn was lying to avoid admitting to a violation of his parole. Accordingly, we vacate the conviction of the Appellant, reverse the ruling of the trial court as to the objection at issue, and remand the case to the Kenton Circuit Court where the Appellant should be allowed to question Flynn about his current status as a parolee.

ALL CONCUR.

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