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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000771-MR

HOYT JAY CALHOUN — APPELLANT

v.

APPEAL FROM WASHINGTON CIRCUIT COURT
HON. SAMUEL TODD SPALDING, JUDGE
ACTION NO. 15-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Hoyt Calhoun, appeals from the Washington Circuit Court's final judgment and sentence of seventeen years' imprisonment, after a jury convicted him of second-degree manslaughter;[1] operating a motor vehicle under

[1] Kentucky Revised Statutes (KRS) 507.040, a Class C felony.

the influence of drugs or alcohol (with a DUI aggravator), first offense;[2] and being a persistent felony offender in the first degree (PFO I).[3] Discerning no error, we affirm.

At approximately 5:00 p.m. on February 18, 2015, Rhonda Yates left work following her shift at the Toyotomi plant in Springfield, Kentucky. The plant had recently reopened after a closure caused by winter weather, and area roads were still in poor condition. Just outside Springfield, Yates's vehicle was struck by another vehicle veering into her lane. Yates was not wearing a seatbelt. She suffered massive bruising to her chest and abdomen, resulting in cardiopulmonary arrest. Despite the efforts of paramedics and hospital staff, Yates's pulse stopped and she died at Spring View Hospital.

The other vehicle involved in the collision was driven by Calhoun. His passenger, Lori Meier, owned the vehicle and had asked Calhoun to drive her to Elizabethtown that morning. Because the roads were slick, the two did not reach Elizabethtown, but elected to turn around and return to Meier's home. At approximately noon, Calhoun began consuming alcohol. He and Meier drove to a convenience store for cigarettes. Meier testified she wanted Calhoun to take her home, but he refused to do so. Immediately before the collision with Yates's car, Meier remembers Calhoun saying he could not see. Meier testified she felt the car

[2] KRS 189A.010(5)(a), a misdemeanor.

[3] KRS 532.080.

"break loose" and slide. She saw headlights and said, "you're going to hit that car." Meier had difficulty remembering anything after that point, having suffered a traumatic brain injury.

One witness to the immediate aftermath of the accident testified at trial Calhoun's speech was slurred and there were "beer cans all over the car." Another witness, a paramedic, testified Calhoun was conscious, disruptive, and smelled of alcohol. After being transported to the hospital, police officers read the implied consent form to Calhoun and obtained consent to draw his blood. A laboratory scientist with Kentucky State Police testified Calhoun's blood alcohol content at the time of the draw was 0.213 grams per 100 milliliters.

Kentucky State Trooper Boston Hensley was the primary investigating officer for the incident. He ultimately determined the two vehicles were traveling in opposite directions and made impact about three feet inside Yates's lane. He observed indented marks in the iced roadway resulting from the crash, but could not immediately determine if the marks penetrated the snow and ice all the way through to the pavement. As part of his investigation, Trooper Hensley photographed the vehicles and road markings, but his camera began malfunctioning due to freezing weather. He returned to the scene four days later and took more photographs of the paved road. These images depicted the scene in better lighting, and with the roadway cleared of snow, ice, and debris from the collision. As part of his trial testimony regarding the second set of photographs,

Trooper Hensley stated the road showed marks in the pavement corresponding to those in the snow and ice from the night of the accident.

In a recorded interview with Trooper Hensley, Calhoun asserted the accident was caused by poor visibility. Calhoun claimed two semitrailer trucks passed him, creating a white cloud of snow around his vehicle, and thus he could not see Yates's vehicle in the next lane. When Trooper Hensley confronted him about the beer cans found in the car, Calhoun said the cans had "been in there," but also admitted, "I ain't gonna lie, I drank a few."

As a result of the investigation, the Washington County grand jury indicted Calhoun for murder,[4] operating a motor vehicle under the influence of drugs or alcohol (with a DUI aggravator), first offense, and being a PFO I. Following a two-day trial, jurors found Calhoun guilty of second-degree manslaughter as a lesser-included offense of murder, plus DUI and being a PFO I. In accord with the jury's recommendation, the trial court sentenced Calhoun to ten years for manslaughter, enhanced to seventeen years by virtue of the PFO, to be served concurrently with a term of thirty days' incarceration for DUI. The trial court entered its final judgment and sentence memorializing these terms on April 20, 2016. This appeal follows.

Calhoun presents two issues on appeal. He first contends the trial court erred by not striking two jurors for cause. Calhoun lodged contemporaneous

[4] KRS 507.020, a Class A felony.

objections, and complied with *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009), by identifying the two jurors he would have struck had he not used peremptory strikes on the two jurors he argues the trial court should have struck for cause. Calhoun's substantial rights may have been prejudiced only if the two people he would have struck sat on his jury. *Id*. (citing *King v. Commonwealth*, 276 S.W.3d 270, 279 (Ky. 2009)). Here, both jurors Calhoun identified as would-be defense strikes sat on the jury. Contrary to the Commonwealth's argument, this issue is preserved and we must determine whether the trial court should have struck the prospective jurors for cause.

"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)). RCr[5] 9.36(1), which gives the criterion for determining whether a juror should be struck for cause, states in relevant part, "[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." In analyzing the rule, the Supreme Court of Kentucky has found a trial court abuses its discretion when it disregards a "*probability* of bias or

[5] Kentucky Rules of Criminal Procedure.

prejudice that is determinative in ruling on a challenge for cause." *Sluss v. Commonwealth*, 450 S.W.3d 279, 282 (Ky. 2014) (citations omitted) (emphasis in original).

Here, Calhoun moved to strike two jurors, Bartley and Sparrow, for cause. Bartley was a nurse employed at Spring View Hospital. She knew the doctor and nurse who worked on the patients in this case, including Calhoun, but she was not involved in the treatment provided. Calhoun asked the trial court to strike Bartley based upon her "medical background." Calhoun's objection before the trial court was based on her training, expressing concern the juror would bring her specialized knowledge into the jury room, outside the presented evidence. As briefed before this Court, however, Calhoun provides a slightly different argument, in which the "medical background" objection may also refer to Bartley being acquainted with the doctor and nurse involved in this case. The difference between the two arguments is immaterial to our resolution of the issue, as explained below. The trial court did not strike Bartley for cause.

At the time of trial, Sparrow had worked in emergency medical services (EMS) for twenty-seven years. Due to her employment, she knew several of the Commonwealth's witnesses who worked this incident as first responders and hospital personnel. However, she did not personally work this collision and knew nothing about the facts of the case. Each time she was questioned, she responded knowing the witnesses would not make her more or less likely to believe them.

Calhoun moved to strike Sparrow because she was acquainted with "more than half" of the Commonwealth's witnesses. When the trial court asked which of Sparrow's responses would require a strike for cause, Calhoun admitted the prospective juror had answered the clarifying questions appropriately. The court did not strike Sparrow for cause.

Merely having a relationship with parties or witnesses in a case is not enough to disqualify a prospective juror. *Hammond v. Commonwealth*, 504 S.W.3d 44, 54-56 (Ky. 2016). However, not all acquaintances with parties or witnesses are harmless. Through *voir dire*, the trial court and counsel identify prospective jurors with the required objectivity.

> As for jurors with some relationship to the case, the trial court must distinguish between those whose objectivity, whose "indifference," remains intact and those so closely related to the case or so susceptible to the relationship as to be predisposed to be more (or less) critical of one side's evidence than the other's. In all cases these distinctions are to be based on the totality of the *voir dire* circumstances: the juror's demeanor, the context of any questions, and the entirety of the juror's responses.

Futrell v. Commonwealth, 471 S.W.3d 258, 272 (Ky. 2015) (footnote omitted).

Calhoun's basis for objecting to Bartley and Sparrow was their medical knowledge and being acquainted with witnesses who worked the collision. However, the language of RCr 9.36(1) does not exclude prospective jurors based upon medical knowledge or being acquainted with witnesses. The operative question is whether the prospective juror can be "fair and impartial." If courts

excluded prospective jurors based upon mere knowledge of witnesses involved, most public professionals living and working in rural areas would be ineligible for jury service. As demonstrated here, an individual working as a doctor, nurse, or paramedic in a rural county will likely know many of the people living there. This should not presumptively exclude them from jury service, nor does RCr 9.36(1) require such exclusion. The trial court correctly pointed out there was no reasonable ground in the record to believe either Bartley or Sparrow would be unable to give a "fair and impartial verdict on the evidence." RCr 9.36(1). There was nothing about their "demeanor, the context of any questions, and the entirety of the juror's responses," *Futrell*, 471 S.W.3d at 272, indicating a lack of objectivity. The trial court did not abuse its discretion in finding both eligible to sit on the case.

For his second issue, Calhoun argues the trial court erroneously permitted the introduction of Trooper Hensley's second set of photographs of the accident scene, taken four days after the collision. "The trial courts are allowed a broad discretion in admitting or rejecting photographs." *Gorman v. Hunt*, 19 S.W.3d 662, 667 (Ky. 2000). However, Calhoun relies heavily on *Mitchell v. Commonwealth*, 423 S.W.3d 152 (Ky. 2014), to argue the second set of images were misleading and should have been excluded.

> A picture may also be inadmissible, although technically accurate, because it portrays a scene that is materially different from a scene that is relevant to one of the issues

> at trial. Before admitting a photograph into evidence, the trial court must find that the dangers of such distortion or wrong emphasis are sufficiently remote so that the trier of fact may consider the photographs for the purposes offered. These are principally questions of authentication.

Id. at 163 (quoting *United States v. Stearns*, 550 F.2d 1167, 1170 (9th Cir. 1977)). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." KRE[6] 901(a).

Calhoun concedes the photographs are technically accurate. He argues they portray the roadway in a materially different condition than it was on the night of the collision. Calhoun's defense at trial was wintry driving conditions and poor visibility caused the accident. He argues the second set of images, depicting a clear roadway in good lighting, provided a danger of "distortion" or "wrong emphasis" to the jury, and unduly prejudiced his defense. Because the photographs did not fairly and accurately depict the scene at the time of the accident, he contends the trial court should have excluded them.

This case is factually distinguishable from *Mitchell*. The photographs in *Mitchell* were misleading because they were deliberately staged to insert a distinctive article of clothing into the scene:

> We next turn to Appellant's assertion that photographs depicting a pickup truck with a sweater hanging from its

[6] Kentucky Rules of Evidence.

> open door and Appellant wearing the same sweater were admitted in error.
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> . . .
>
> The sweater is of importance because Officers Masterson and Hirtzell, who eventually apprehended Appellant, both testified that the man they saw carrying property to the stolen truck was wearing the sweater. Thus, if the sweater belonged to Appellant it would tend to tie him to the stolen vehicle.
>
> The distinctive sweater was found discarded in White's living room after Appellant was apprehended in the bathroom. An unidentified police officer then took the sweater out to the truck that Appellant was seen carrying property to. A photo was taken of the truck with the sweater draped across the driver's door. Later, the police had Appellant put the sweater on and took a photo of him wearing it. Officer Hirtzell admitted at trial that the sweater was not found on the pickup truck.

Mitchell, 423 S.W.3d at 162.

Here, the photographs were not staged to present a matter of "distortion" or "wrong emphasis" to the jury. Trooper Hensley's initial set of photographs, taken on the night of the collision, were presented to the jury first. Jurors saw for themselves the wrecked vehicles and the snowy road conditions in those photographs. In admitting the second set of images, the trial court ensured proper authentication and Trooper Hensley explicitly testified the second set of photographs was taken four days later. There was no chance a reasonable juror would have confused the second set of images with those taken of the road conditions the night of the collision. Furthermore, the second set was presented to

the jury for the purpose of showing marks on the highway caused by the collision —an acceptable practice in Kentucky courts for nearly seventy years. *Square Deal Cartage Co. v. Smith's Adm'r*, 307 Ky. 135, 140-41, 210 S.W.2d 340, 343 (1948) (images of road markings caused by vehicle collision admissible even though taken day after collision). The trial court did not abuse its discretion by admitting Trooper Hensley's second set of photographs.

For the foregoing reasons, we affirm the final judgment and sentence entered by the Washington Circuit Court.

ALL CONCUR.

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