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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001386-MR

JEREMY D. CARAWAY — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
ACTION NO. 11-CR-00182

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, JOHNSON AND TAYLOR, JUDGES.

COMBS, JUDGE: Jeremy D. Caraway brings this appeal from an order of the Harlan Circuit Court denying his motion filed pursuant to RCr[1] 11.42. He argues that his trial and appellate attorneys were ineffective for failing to raise a unanimity error in his jury instructions. He also argues that his trial counsel was ineffective

[1] Kentucky Rules of Criminal Procedure.

for failing to challenge venue and for failing to strike a biased juror. We agree that Caraway's attorney did fail to raise a unanimity error, but we disagree with Caraway's other contentions. Therefore, we vacate and remand for a new trial as to his second-degree rape conviction and for one of his first-degree sexual abuse convictions. We affirm Caraway's remaining convictions.

Caraway was the pastor at Loyall Church of God in Harlan County, Kentucky. After engaging in sexual activity with Sherry,[2] a thirteen-year-old child who attended his church, Caraway was indicted on two counts of second-degree rape, two counts of second-degree sodomy, two counts of first-degree sexual abuse, two counts of first-degree unlawful transaction with a minor, and one count of unlawful use of electronic means to induce a minor to engage in sexual activities. The court subsequently dismissed one count of sodomy, both counts of unlawful transaction, and the charge of unlawful use of electronic means.

Following a two-day trial, the jury found Caraway guilty of one count of second-degree rape, one count of second-degree sodomy, and two counts of first-degree sexual abuse. The jury acquitted Caraway of the second count of rape. He was sentenced to five years on each count, to be served consecutively, for a total of twenty-years' imprisonment.

The Kentucky Supreme Court affirmed his convictions on direct appeal. *Caraway v. Commonwealth*, 459 S.W.3d 849 (Ky. 2015). Caraway, *pro se*, then filed a motion to vacate his sentence pursuant to RCr 11.42. The circuit

[2] "Sherry" is a pseudonym used by the Kentucky Supreme Court on direct appeal to refer to Caraway's minor victim.

court denied Caraway's motion without an evidentiary hearing. Caraway filed a motion to reconsider, which the court also denied.

Caraway raises the following claims of ineffective assistance on appeal: (1) that trial counsel was ineffective for failing to object to jury instructions in violation of his constitutional right to a unanimous jury verdict; (2) that appellate counsel was ineffective for failing to raise the unanimous verdict issue on direct appeal; (3) that trial counsel was ineffective for failing to challenge the circuit court's jurisdiction for first-degree sodomy and first-degree sexual abuse; and (4) that trial counsel was ineffective for failing to strike a biased juror.

In order to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient because it fell below an objective standard of reasonableness as measured against prevailing professional norms; and (2) that counsel's deficient performance resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984). Furthermore, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). On appeal, a reviewing court looks *de novo* at counsel's allegedly deficient performance and any potential deficiency that it may have caused. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). An evidentiary hearing is required only "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or

disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

First, Caraway argues that his trial counsel was ineffective for failing to object because the jury instructions for second-degree rape and first-degree sexual abuse violated his right to a unanimous verdict. He claims that the Commonwealth presented testimony of three different incidents of second-degree rape but that he was only charged with two incidents of rape. Caraway also asserts that his counsel was ineffective for failing to object when the jury heard proof of two counts of first-degree sexual abuse, which arguably could have fallen under the same "blanket" instruction. We agree with both of Caraway's arguments.

"Section 7 of the Kentucky Constitution requires a unanimous verdict reached by a jury of twelve persons in all criminal cases." *Wells v. Commonwealth*, 561 S.W.2d 85, 87 (Ky. 1978). Specificity in instructing - as to each separate offense charged is the hallmark of the unanimity requirement.

> A general jury verdict based on an instruction including two or more separate instances of a criminal offense violates the requirement of a unanimous verdict. So it is not enough that sufficient evidence existed to support a jury finding that [the defendant] committed both criminal acts.

Kingrey v. Commonwealth, 396 S.W.3d 824, 831 (Ky. 2013).

We have reviewed Sherry's testimony regarding second-degree rape and first-degree sodomy, and we shall discuss its contents only as necessary and relevant to the issues on appeal. Sherry testified that she and Caraway engaged in

sexual intercourse on three separate occasions. In the first incident, Sherry testified that Caraway agreed to meet her for a youth meeting in the church -- even though there was no youth meeting. While in the church, Sherry and Caraway began kissing. Caraway "grinded against" Sherry, and he rubbed her vagina. Sherry and Caraway then removed their pants. He began to penetrate her, but she stopped him because it hurt. In the second incident, Sherry testified that Caraway came over to her house. Caraway again attempted to have sexual intercourse with her, but he stopped and fled when her father came home.[3] The third incident also occurred in the church. Sherry testified that he again attempted to have sexual intercourse with her, but she again stopped him because it hurt. She also stated that they kissed and he "rubbed [her] vagina a little bit over [her] clothes." Caraway was charged with second-degree rape concerning only the first and third incidents, but not the second. Additionally, Caraway was only charged with first-degree sexual abuse for the rubbing that occurred during the first incident, but not the third.

We will first examine Caraway's second-degree rape conviction. He was convicted of the first count of second-degree rape but was acquitted of the second count. Caraway's jury instructions for second-degree rape were identical except that the second instruction contained language clarifying that it covered an incident which occurred after the incident described in the first instruction. We

[3] While describing this incident, Sherry did not explicitly state that Caraway penetrated her. However, later in Sherry's direct examination, she testified that Caraway penetrated her on three separate occasions.

note that the trial court attempted to distinguish the counts by stating that the second offense took place subsequently to the first offense. We also note that Caraway was acquitted of the second count of rape. However, because Sherry testified that Caraway penetrated her three times, each of the three incidents that she described **could have** constituted second-degree rape. *See* KRS[4] 510.050. And even though Caraway was acquitted of a rape which occurred subsequently to the first count, this instruction still failed to factually distinguish the uncharged count from the remaining charged count. Thus, some jurors could have reasonably convicted Caraway of either the first incident of rape that Sherry described (the first charged count) or the second incident she described (the uncharged count). Therefore, Caraway's instruction for second-degree rape contained a unanimity error. *See Johnson*, 405 S.W.3d 439,449 (Ky. 2013).

We will now examine Caraway's argument concerning an alleged unanimity error in one of his first-degree sexual abuse instructions. The instruction in question concerned an event which occurred "at the Loyall Church of God, during the month of May[.]" Caraway argues that this instruction could have referred to either of the incidents at the Loyall Church of God in which Caraway allegedly rubbed Sherry's vagina. We agree that this instruction also contained a unanimity error.

The Commonwealth's sole argument regarding this issue is that the unanimity error was "cured" during closing arguments. During closing arguments,

[4] Kentucky Revised Statutes.

the Commonwealth explained which incidents were charged and which were not. However, the Kentucky Supreme Court has held that the Commonwealth cannot cure unanimity errors during closing arguments. *Harp v. Commonwealth*, 266 S.W.3d 813, 819-20 (Ky. 2008).

Caraway's counsel did not object to the trial court's jury instructions. Although she tendered instructions, her instructions contained similar unanimity problems. This deficiency resulted in prejudice to Caraway. Because the jurors presumably might not have found Caraway guilty of the same instance of second-degree rape or first-degree sexual abuse, he was prejudiced by his counsel's failure to raise these issues to the trial court. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Caraway's trial counsel was, therefore, ineffective pursuant to the *Strickland* standard.

Caraway has also argued that his appellate counsel was ineffective for failing to raise this issue on direct appeal. A claim of ineffective assistance of appellate counsel will succeed only when the reviewing court concludes that appellate counsel "omitted completely an issue that should have been presented on direct appeal." *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010). In order to establish the prejudice prong of *Strickland*, the appellant must show that "absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded." *Id.* Caraway's direct appeal was affirmed in favor of the Commonwealth. Because Caraway's unanimity argument was meritorious, his appellate counsel was ineffective for failing to raise it on appeal. Therefore,

Caraway is entitled to a new trial with respect to his charges of first-degree sexual abuse and second-degree rape.

Next, Caraway alleges that his counsel was ineffective for failing to challenge venue for his convictions of first-degree sodomy and first-degree sexual abuse. Specifically, Caraway asserts that Sherry's testimony was insufficient to establish that the counts of first-degree sodomy and first-degree sexual abuse occurred in Cawood, Kentucky. We disagree. KRS 452.510 provides that the venue of a criminal prosecution is in the county in which the offense was committed. "The presumption is that a trial was held in the appropriate county. Only slight evidence is required to sustain the venue." *Bedell v. Commonwealth*, 870 S.W.2d 779, 781 (Ky. 1993) (citations omitted). Sherry testified that she knew that the incidents occurred in Cawood because her friend lived there and they passed her house. The evidence provided by Sherry in this case, combined with the presumption that the trial occurred in the appropriate county, was sufficient to satisfy the "slight evidence" required to establish venue. Caraway's counsel was not ineffective for failing to object to it at trial.

Caraway's final argument on appeal is that his counsel was ineffective for failing to strike Juror 367, a probation and parole officer. Caraway claims that Juror 367 should have been struck for cause because she worked both with the Commonwealth's attorney and with the defense counsel and because she attended some of the preliminary proceedings in Caraway's case.

RCr 9.36(1) provides that a juror should be stricken for cause "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence[.]"

> The decision as to whether to strike a prospective juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.

Chatman v. Commonwealth, 241 S.W.3d 799, 801 (Ky. 2007) (citation and internal quotation marks omitted). In making its determination, "the court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *McDaniel v. Commonwealth*, 341 S.W.3d 89, 92 (Ky. 2011).

Caraway presented this argument on direct appeal, and the Kentucky Supreme Court declined to address it because his attorney had waived it. *Caraway*, 459 S.W.3d at 852. Its transcript of the relevant portions of *voir dire* was as follows:

> Judge: Does anybody know anything about the events in this case? Or have you heard anything, read anything, or have any knowledge whatsoever about this case?
>
> Prospective Juror:[5] I've been in court when [Caraway]'s come in for court [inaudible].
>
> Judge: Do you know anything other than what you saw in the court proceedings?
>
> Prospective Juror: No.

[5] It is uncertain whether the "Prospective Juror" referred to the Kentucky Supreme Court's opinion is actually Juror 367. We will discuss this identity issue further below.

Judge: You didn't hear anything about the facts of the case, did you?

Prospective Juror: No.

Judge: Is there anything that you may have learned from that to cause you to favor or disfavor one side or the other?

Prospective Juror: No.

A short time later, the conversation returned to Juror 367:

Judge: Does anyone have a connection to any of the attorneys in the case, Ms. West or the Commonwealth attorneys, as far as have they represented you in the past? Do they now? Have they been on the other side of a case from you? Or any involvement at all?

Juror 367: I work in the court system.

Judge: And what is your function in the court system?

Juror 367: Probation and parole officer.

Judge: And you worked with all of the attorneys involved in here?

Juror 367: Yes.

Judge: Would you tend to favor or disfavor one side or the other because of that?

Juror 367: No.

Neither Caraway's trial counsel nor the Commonwealth's attorneys had any further questions for Juror 367, and there was no further discussion at all of her qualifications and impartiality. Significantly, Juror 367 was not challenged for cause, nor was she removed from the panel with a peremptory strike. She ultimately sat on the jury, which was accepted by the parties and

> sworn to serve. Juror 367 also served as foreperson at trial.

Id. at 851–52 (footnotes omitted).

Even when the record surrounding an allegation of juror bias is brief, we are nonetheless confined to that record. *Grubb v. Norton Hosps., Inc.*, 401 S.W.3d 483, 485 (Ky. 2013). Indeed, the Kentucky Supreme Court has held that a juror was not required to be struck for cause when the appellant had not offered sufficient evidence to presume bias. *Id.* at 486-87. As in *Grubb*, we are not at liberty to presume bias based on the evidence in the present case.

As previously noted, the Kentucky Supreme Court stated that it was impossible to determine whether the "Prospective Juror" identified above was actually Juror 367 or another juror. *Caraway*, 459 S.W.3d at 851 n.2. Therefore, Caraway's claim that Juror 367 had any direct knowledge of the case is speculative and lacks the specificity required in this context. Additionally, assuming, *arguendo,* that Juror 367 did attend the pretrial proceedings, the record does not contain any indication as to what information she actually heard -- other than that she did not overhear the facts of the case. Juror 367 said nothing in *voir dire* that indicated she could not make a fair and impartial decision after considering the evidence. She stated that she had not learned anything that would predispose her to favoring one side over the other.

Juror 367 also did not provide any disqualifying prejudices concerning the lawyers in the case. The record does not contain any information

concerning the extent of the relationship between Juror 367 and the prosecution or defense counsel; disqualification is not required in every instance where a juror knows an attorney in a case. *See*, *e.g.*, *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998). Finally, the mere fact that Juror 367 worked as a probation and parole officer did not disqualify her. *See Sanders v. Commonwealth*, 801 S.W.2d 665, 670 (Ky. 1990) ("The fact that [a juror] was a law enforcement officer was not sufficient reason to excuse him for cause."). There is no indication that Juror 367 could not have rendered a fair and impartial verdict on the evidence as required by RCr 9.36(1). Caraway's counsel was not ineffective for failing to strike Juror 367 for cause.

Although Caraway has requested an evidentiary hearing, his claims of ineffective assistance of counsel are either conclusively proved or disproved by the record. *Fraser*, 59 S.W.3d at 452. No evidentiary hearing is warranted.

For the foregoing reasons, the order of the Harlan Circuit Court denying Caraway's RCr 11.42 motion is reversed. We vacate Caraway's second-degree rape conviction and one of his first-degree sexual abuse convictions, and we remand the case for a new trial on those counts. We affirm Caraway's remaining convictions.

ALL CONCUR.

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