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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001664-MR

DONTE RICE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN S. LAPE, JUDGE
ACTION NO. 15-CR-00099

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Donte Rice appeals from the judgment of conviction sentencing him to ten years' imprisonment for possession of a handgun by a convicted felon. We affirm.

Rice was arrested on the morning of December 6, 2014, after he had appeared, with a loaded gun tucked into his waistband, at the Kenton County Detention Center to post bond on behalf of an inmate. Rice had fallen asleep while

in the waiting room, and personnel on staff noticed the weapon and called for backup. The gun, which was in plain sight, was taken from Rice while he slept. When he was awakened, he reached for where the gun had been and, after realizing it was no longer there, fled the scene. He was caught later that morning hiding in the restroom of a nearby park. Rice was ultimately indicted for the possession charge as well as fleeing or evading police and resisting arrest.

At the outset of the two-day trial in August 2016, Rice stipulated to the fact that he was a convicted felon. Later, when he testified on his own behalf, he admitted to all the evidence presented during the Commonwealth's case in chief, essentially pleading guilty as charged. His theory of defense was that he regretted his behavior and requested the minimum sentence. Rice was convicted of possession of a handgun by a convicted felon, and the jury recommended the maximum sentence, although it urged Rice to take advantage of incarceration programs that would reduce the amount of time spent in prison. Rice entered a guilty plea to the charge of fleeing or evading, and the charge of resisting arrest was dismissed. The circuit court sentenced Rice to ten years in prison. Other facts will be introduced in the discussion of the separate issues brought on appeal.

Rice first argues that the circuit court erred in limiting voir dire. Specifically, Rice points to an objection by the Commonwealth during defense counsel's jury questions regarding the right not to testify. After asking the venire

whether they would "hold it against" Rice if he didn't testify, which was met with silence by the jurors, counsel asked, "Can anyone think of any reasons why he may not want to testify?" The Commonwealth's objection to this last question was sustained by the circuit court after a brief bench conference, and defense counsel moved on to another line of inquiry. Later, after defense counsel concluded voir dire, a juror was struck for cause after revealing that he would be more likely to find Rice guilty if he did not testify.

Rice now complains that defense counsel should have been allowed to pursue his line of questioning regarding an accused's right not to testify. He maintains that "[b]riefly leading the jury to a nuanced understanding of motivations for witnesses [not] to testify could have helped the jury evaluate credibility as well," and that one juror struck for cause raised the possibility that other jurors "who felt the same way . . . may have remained on the jury." Rice insists that the circuit court's curtailment of defense counsel's voir dire examination "deprived [him] of his constitutional right to a fair trial before an impartial tribunal."

We disagree. Kentucky Rule of Criminal Procedure (RCr) 9.38 ("Examination of jurors") contains discretionary language, namely:

> The court **may** permit the attorney for the Commonwealth and the defendant or the defendant's attorney to conduct the examination of prospective jurors or **may** itself conduct the examination. In the latter event

> the court shall permit the attorney for the Commonwealth and the defendant or the defendant's attorney to supplement the examination by such further inquiry as it deems proper. The court **may** itself submit to the prospective jurors such additional questions submitted by the parties or their attorneys as it deems proper. When the Commonwealth seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required if questions regarding capital punishment, race or pretrial publicity are propounded. Further, upon request, the Court shall permit the attorney for the defendant and the Commonwealth to conduct the examination on these issues.

(Emphases added.)

> While it is within the discretion of the trial court to limit the scope of voir dire, that discretion is not boundless. Appellate review of such limitation is for abuse of discretion. *Webb v. Commonwealth*, 314 S.W.2d 543, 545 (Ky. 1958) (trial court abused discretion by not permitting defendant being tried for the murder of his father to examine jurors on their views concerning patricide and self-defense). However, "[t]o be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Mu'Min v. Virginia*, 500 U.S. 415, 425-26, 111 S.Ct. 1899, 1905, 114 L.Ed.2d 493 (1991). The test for abuse of discretion in this respect is whether an anticipated response to the precluded question would afford the basis for a peremptory challenge or a challenge for cause.

Hayes v. Com., 175 S.W.3d 574, 583 (Ky. 2005). Here the circuit court allowed defense counsel to ask potential jurors whether they would fault the defendant if he were to remain silent throughout the trial. Counsel was permitted to ask a follow-

up question which went unanswered. His third question in that regard precipitated the Commonwealth's objection, which was sustained. This situation differs from that in *Hayes*, where counsel was prohibited from asking even the first question (i.e., whether the jury would penalize Hayes for exercising his constitutional right not to testify), and the circuit court ruled that it would address the issue in the jury instructions. The *Hayes* court reversed and remanded for a new trial, holding thus:

> [T]he failure to permit counsel to ascertain during voir dire whether any of the prospective jurors would hold against them the fact that they exercised their Fifth Amendment privilege not to testify was an abuse of discretion that denied Hayes and Harrison their fundamental right to a fair and impartial jury, an error that is not subject to harmless error analysis.

Hayes, 175 S.W.3d at 586 (citation omitted). Rice was not denied that fundamental right. And he fails to demonstrate that an "anticipated response to the precluded question would afford the basis for a peremptory challenge or a challenge for cause." *Id.* at 583. Furthermore, Rice later testified and admitted that he had in fact committed the crimes for which he had been charged. Therefore, any perceived error did not affect the outcome of the trial. The trial judge correctly refused to allow Rice's proposed questions. *See Woodall v. Com.*, 63 S.W.3d 104, 116-17 (Ky. 2001), *as amended* (Jan. 15, 2002).

Rice next argues that the prosecutor improperly cross-examined him regarding ownership of the gun in Rice's possession. When Rice claimed that the

gun belonged to "a close friend," the prosecutor insisted on learning the friend's name, which Rice refused to disclose, claiming that he had the right not to answer. The prosecutor repeated the question, and Rice remained silent. After a bench conference, the prosecutor indicated that he would withdraw the question, yet he then stated in open court: "So evidently there's honor among people where felons get guns and you're not going to answer that question." Defense counsel objected, and the prosecutor offered to rephrase the question. The prosecutor continued to question Rice about the gun on cross-examination. No further relief was requested by defense counsel.

Rice contends that this line of questioning was irrelevant and "hinted at uncharged criminal behavior and socializing with unsavory criminal types." He cites Kentucky Rules of Evidence (KRE) 401, 403, and 404 in support of his argument, and he maintains that this line of questioning was "a form of prosecutorial misconduct." Again, we disagree. Although defense counsel raised objections during cross-examination, he did not move for a mistrial or request an admonition. "[A] failure to request an admonition after an objection had been sustained means that 'no error occurred.'" *Allen v. Com.*, 286 S.W.3d 221, 225-26 (Ky. 2009) (citation omitted); *see also Roach v. Com.*, 313 S.W.3d 101, 111 (Ky. 2010).

Nor did the line of questioning rise to the level of palpable error. RCr 9.24 and 10.26. As stated previously, Rice stipulated that he was a convicted felon, and he admitted guilt during his testimony. "There is simply no substantial possibility in this case that the verdict was swayed by" the prosecutor's questions, and the error, if any, is therefore deemed harmless. *Winstead v. Com.*, 283 S.W.3d 678, 689 (Ky. 2009).

We are lastly asked to consider whether the prosecution's closing argument during the guilt phase of the trial was unduly prejudicial. We hold that it was not. The comments in question were in response to a door opened by defense counsel's closing argument. In no measure did they constitute flagrant misconduct. "In the end, our review must center on the essential fairness of the trial as a whole, with reversal being justified only if the prosecutor's misconduct was 'so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings.'" *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (citation omitted). "We find that the remarks referred to here were well within the proper bounds of a closing argument and certainly did not affect the outcome of the trial." *Slaughter v. Com.*, 744 S.W.2d 407, 412 (Ky. 1987).

The judgment of the Kenton Circuit Court is affirmed.

KRAMER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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