RENDERED: AUGUST 10, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000978-MR

JASON DAVID ARNOLD APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CR-00535-001

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

KRAMER, JUDGE: Jason David Arnold appeals the Fayette Circuit Court's judgment convicting him of second-degree escape and of being a first-degree persistent felony offender (PFO-1st). Following our review of the record, we affirm because the circuit court's evidentiary rulings were not in error; the court did not violate Arnold's right to present a defense; Arnold was not entitled to a

"choice of evils" jury instruction; and Arnold failed to prove that Juror 4342 should have been dismissed for cause.

I. FACTUAL AND PROCEDURAL BACKGROUND

Jason David Arnold was indicted on charges of second-degree escape and PFO-1st. During his jury trial, recordings of two telephone calls that Arnold had with his girlfriend, Morgan Cain, while he was imprisoned at Blackburn Correctional Complex (BCC), were played. The telephone calls were two of the approximately ten telephone calls between Arnold and Ms. Cain on the day of his escape from BCC. All ten of the telephone calls were recorded, and Arnold wanted all of them played for the jury. The circuit court only permitted the last two to be played. Arnold was convicted on both counts. He was sentenced to two years of imprisonment for the escape conviction, which was enhanced to eleven years and six months of imprisonment due to the PFO-1st conviction.[1]

II. ANALYSIS

A. RULE OF COMPLETENESS

Arnold first alleges that the circuit court's introduction of only two of the ten telephone call recordings violated the rule of completeness found in KRE[2] 106. He asserts that he asked to introduce all the conversations between himself

[1] We note that Arnold's original sentence was five years. He was only approximately three months into that sentence when he escaped.

[2] Kentucky Rule of Evidence.

and Ms. Cain that were recorded on the day of his escape, for the sake of completeness. He claims that he escaped because he thought that Ms. Cain might harm herself. He argues that if the jury had heard all ten recordings, this would have put his escape into context because the recordings that were not played would have demonstrated to the jury Ms. Cain's state of mind. Accordingly, they would have helped explain why he escaped. Arnold alleges that the two recordings that were played for the jury primarily focused on their plan of escape, not on Ms. Cain's mental state. He contends that the circuit court denied his request to play all ten recordings, "ruling that they would not be 'listening to an hour of [tele]phone calls.'"

We review a "trial court's ruling under KRE 106 (*i.e.*, the 'rule of completeness')" for an abuse of discretion. *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 330 (Ky. 2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (internal quotation marks and citation omitted).

KRE 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

> In determining fairness, the issue is whether the meaning of the included portion is altered by the excluded portion. Accordingly, KRE 106 allows a party to introduce the remainder of a statement offered by an adverse party for the purpose of putting the statement in its proper context and avoiding a misleading impression. . . .

Sykes v. Commonwealth, 453 S.W.3d 722, 726 (Ky. 2015) (internal quotation marks and citations omitted). "KRE 106 is needed to guarantee that admitted statements are fully understandable and clear. . . ." *Id*. (Internal quotation marks and citation omitted). "KRE 106 does not 'open the door' for introduction of the entire statement or make other portions thereof admissible for any reason once an opposing party has introduced a portion of it." *Id*. at 726-27 (internal quotation marks and citation omitted).

Although Arnold claims that all ten recorded conversations should have been played for the jury, rather than just the two that were played, he does not cite to where in the record we could find the other eight recordings. "It is the Appellant's duty to ensure that the record on appeal is sufficient to enable the court to pass on the alleged errors." *Smith v. Smith*, 450 S.W.3d 729, 731 (Ky. App. 2014) (internal quotation marks and citation omitted). Additionally, "[i]t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Id*. at 732 (internal quotation marks and citation omitted) (alteration in original).

Alternatively, even if the other eight recordings are in the record, CR[3] 76.12 requires citations to the record. "It is not the court's responsibility to search the record to determine if a party's factual contentions are supported." *O'Rourke v. Lexington Real Estate Co. L.L.C.*, 365 S.W.3d 584, 587 (Ky. App. 2011) (citation omitted).

Because Arnold either failed to include the other eight recordings in the record or failed to cite to where we could find them in the record, we are unable to review them. Therefore, we must assume that the omitted recordings support the decision of the circuit court. The failure to admit them into evidence did not violate the rule of completeness.

B. RIGHT TO PRESENT A DEFENSE

Arnold next asserts that the circuit court violated his right to present a defense when it (1) refused to permit him to play the remaining eight recorded telephone conversations between Ms. Cain and himself and (2) it denied him permission to cross-examine Ms. Cain about the telephone conversations and her emotional stability on the day of the escape.

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. This right, often termed the "right to present a defense," is firmly ingrained in Kentucky jurisprudence, and has been recognized repeatedly by the United States Supreme Court. Of

[3] Kentucky Rule of Civil Procedure.

> course, not all evidentiary errors implicate the constitution. But [a]n exclusion of evidence will almost invariably be declared unconstitutional when it significantly undermine[s] fundamental elements of the defendant's defense. As [the Kentucky Supreme Court] has noted: It is crucial to a defendant's fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defense, and we reject any alternative that would imperil that right. A trial court may only infringe upon this right when the defense theory is unsupported, speculative, and far-fetched and could thereby confuse or mislead the jury.

Daugherty v. Commonwealth, 467 S.W.3d 222, 236 (Ky. 2015) (internal quotation marks and citations omitted) (alterations in original).

"Exculpatory evidence" is defined as: "Evidence tending to establish a criminal defendant's innocence." *Exculpatory evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014). Arnold was convicted of second-degree escape. Pursuant to KRS[4] 520.030(1), "[a] person is guilty of escape in the second degree when he escapes from a detention facility or, being charged with or convicted of a felony, he escapes from custody."

We begin by noting that, as we previously discussed, because Arnold failed to cite where in the record we could find the eight other telephone recordings or the recordings were not included in the record before us, we must assume that the missing record supports the circuit court's decision concerning the recordings.

---

[4] Kentucky Revised Statute.

As for the court's decision denying Arnold permission to cross-examine Ms. Cain about the telephone conversations and her emotional stability on the day of the escape, the court did not violate Arnold's right to present a defense. Arnold admitted during his trial testimony that he had escaped. Ms. Cain's mental state does not constitute "exculpatory evidence" to Arnold's crime of second-degree escape because it does not tend to show his innocence. Further, defense counsel was able to cross-examine Ms. Cain to some extent about those telephone conversations and her emotional stability on that day. Ms. Cain acknowledged during her testimony that she told Arnold during the telephone conversations at issue that she was "not a healthy person," "tired of hurting people," "afraid of [her] mom dying," and "afraid of everything . . . a mess . . . afraid of losing everything—of failure." Ms. Cain also attested that she had a history of mental health issues. Additionally, when Arnold testified on his own behalf at trial, he stated that he knew Ms. Cain had mental health issues and that she had been hospitalized in the past for them. Therefore, evidence was presented to the jury regarding Ms. Cain's mental state and the content of their telephone conversations.

Moreover, to the extent that Arnold contends the circuit court violated his right to present a "choice of evils" defense, his claim lacks merit. The "choice of evils" defense is explained in KRS 503.030 as follows:

> (1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with

> some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, except that no justification can exist under this section for an intentional homicide.
>
> (2) When the defendant believes that conduct which would otherwise constitute an offense is necessary for the purpose described in subsection (1), but is wanton or reckless in having such belief, or when the defendant is wanton or reckless in bringing about a situation requiring the conduct described in subsection (1), the justification afforded by this section is unavailable in a prosecution for any offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

Arnold presented no evidence to show that Ms. Cain threatened to harm herself on the day of his escape. Ms. Cain testified that she was upset the first time that Arnold called her on the day of the escape because it was the day before the first anniversary of when her ex-husband had served her with divorce papers; she was still living with her ex-husband; and she was upset about her living situation. However, she attested that by the time of Arnold's escape, she was not as upset. In fact, on the last two telephone recordings that were made before his escape, Ms. Cain can be heard laughing and joking with Arnold. No evidence presented suggested that Ms. Cain was in danger of physically harming herself. Additionally, after he escaped, Arnold did not take Ms. Cain to a hospital to get treatment for her alleged depression anytime before they were caught; they were

not caught for days. Therefore, Arnold failed to show that his escape was necessary to avoid an imminent private injury. Consequently, his "choice of evils" defense lacked merit. Because his defense theory was unsupported, speculative, and could thereby confuse or mislead the jury, the circuit court did not violate Arnold's right to present a defense when it refused to allow the defense to further cross-examine Ms. Cain about the telephone conversations and her emotional stability on the day of the escape. *See Daugherty*, 467 S.W.3d at 236.

C. TELEPHONE CALLS

Arnold next contends that the circuit court abused its discretion when it prevented him from fully cross-examining Ms. Cain and playing numerous telephone calls between himself and Ms. Cain. We review a trial court's evidentiary ruling for an abuse of discretion. *Woodard*, 147 S.W.3d at 67. As previously discussed, because Arnold failed to cite where in the record we could find the eight recordings, or they were not included in the record before us, we must assume that the missing record supports the circuit court's decision. Additionally, we determined *supra* that the circuit court did not err when it denied Arnold permission to cross-examine Ms. Cain further regarding the telephone calls and her emotional stability.

D. CHOICE OF EVILS JURY INSTRUCTION

Arnold also alleges that the circuit court erred in refusing to allow him a "choice of evils" jury instruction. However, as we discussed *supra*, his "choice of evils" defense lacked merit, as Arnold failed to show that his escape was necessary to avoid an imminent private injury.[5] "A defendant is entitled to have the jury instructed on the merits of any lawful defense which he or she has. However, the entitlement to an affirmative instruction is dependent upon the introduction of some evidence justifying a reasonable inference of the existence of a defense." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 184 (Ky. 2003) (internal quotation marks and citations omitted). Because no evidence was introduced to show that Arnold's escape was necessary to avoid an imminent private injury, he was not entitled to a jury instruction regarding the "choice of evils" defense.

E. FAILURE TO DISMISS JUROR FOR CAUSE

Finally, Arnold contends that the circuit court abused its discretion when it failed to dismiss Juror 4342 for cause. He alleges that the juror should have been stricken for cause because "she was a member of the citizen's police

---

[5] Although Arnold claims in his opening brief that "he believed Ms. Cain would harm herself if he did not leave [BCC]," and that "[his] concerns for Ms. Cain's emotional stability were also corroborated by direct testimony from Ms. Cain herself," the portion of the video record that he cites in support of his allegation that Ms. Cain's direct testimony corroborated his concerns does not actually support his claim. During the portion of the video record that Arnold cites in support of this allegation, Ms. Cain did not state that she threatened to harm herself or that she was even thinking of harming herself the day of his escape.

academy and because her brother had been incarcerated (and she only visited him once)."

> [W]hether to excuse a juror for cause rests upon the sound discretion of the trial court and on appellate review, we will not reverse the trial court's determination unless the action of the trial court is an abuse of discretion or is clearly erroneous. Implicit in that rule is the assumption that the trial court has applied the correct standard for exercising it[s] discretion. . . .
>
> RCr[6] 9.36(1) plainly and succinctly establishes the standard by which trial courts are to decide whether a juror must be excused for cause. The rule says: "When 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."
>
> Rule 9.36(1) is the only standard for determining whether a juror should be stricken for cause. A clearer, more concise expression would be difficult to conceive. "Reasonable ground to believe" is a familiar, easily-applied concept that trial judges use regularly in a variety of situations.

Sturgeon v. Commonwealth, 521 S.W.3d 189, 192-93 (Ky. 2017) (internal quotation marks and citation omitted).

During *voir dire*, Juror 4342 informed the court that she had a brother who had been in prison three times (once in Minnesota for a rape conviction, and twice in Pike County—once for "drugs,"[7] and the other time for what she described as a DUI where the passenger in his car died (she was uncertain of the terminology

[6] Kentucky Rule of Criminal Procedure.

[7] Juror 4342 did not explain what type of drug conviction it was.

for the exact crime he had committed in that case, so she described the facts in this way)). The juror stated that she had visited her brother once in Pike County, but nothing about her visit with him caused her any concern about being a juror (in fact, she stated that she had been a juror in Illinois once since visiting him). Juror 4342 told the court that she did not think the situation with her brother would affect her ability to be fair and impartial to someone else. She stated that she is a member of a citizen's police academy where she learns what the police do and tours various places. She once toured BCC.

To the extent that Arnold contends the juror should have been stricken for cause because "her brother had been incarcerated (and she only visited him once)," his claim lacks merit. There was no reasonable ground to believe that the prospective juror could not render a fair and impartial verdict on the evidence. She informed the court that she did not think she would have any difficulty being fair and impartial.

To the extent that Arnold asserts the juror should have been stricken for cause because she belonged to a citizen's police academy, this claim also lacks merit. Even if she had been a police officer, that fact alone would be insufficient to remove her for cause. The Kentucky Supreme Court has held numerous times that

> the mere fact that a person is a current or former police officer is insufficient to warrant removal for cause. . . .

> Additional evidence of bias must be shown. . . . We have required, rather, such additional evidence of bias as the prospective juror's personal acquaintance with the officers involved in the investigation of the case being tried, or his assertion during voir dire that police officers are less apt than other witnesses to lie because they take their oaths more seriously.

Brown v. Commonwealth, 313 S.W.3d 577, 597 (Ky. 2010) (internal quotation marks and citation omitted).

Arnold has not shown that Juror 4342 was personally acquainted with the officers involved in the case and he has not set forth any other evidence to demonstrate she was biased. Therefore, he failed to show that the juror's membership in a citizen's police academy provided a reasonable ground to believe that the juror could not be fair and impartial.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven Nathan Goens
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Matthew R. Krygiel
Assistant Attorney General
Frankfort, Kentucky