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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001717-MR

JOE ANTHONY NOEL — APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 16-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Joe Anthony Noel brings this appeal from a Judgment of the Trigg Circuit Court entered September 18, 2017, upon a jury verdict finding Noel guilty of theft by unlawful taking $500-10,000 and sentencing him to four-years' imprisonment. We affirm.

The facts in this appeal are uncontested. On June 5, 2016, officers from the Trigg County Sheriff's Office surrounded Noel's house seeking to take

him into custody pursuant to active warrants for his arrest. Noel managed to escape. Two days later, Noel's neighbor noticed his 2006 Buick Rendezvous was missing from his driveway. Security footage showed Noel had taken the Buick, which was found on a road a few miles away with the keys in its ignition. Noel was arrested several weeks later and charged with theft by unlawful taking (TBUT). On August 29, 2017, Noel was tried and convicted at a jury trial. Based upon the jury's recommendation the trial court sentenced Noel to four-years' imprisonment. This appeal followed.

Noel raises two arguments on appeal. His first argument is that the circuit court committed reversible error by failing to strike a juror for cause. Noel argues that Juror 123 demonstrated he could not render a fair and impartial verdict, and the court erred by failing to strike him for cause. During *voir dire*, Juror 123 stated he had heard about the case from social media and had worked on job sites in the construction industry with Noel. The juror did not have a negative personal impression of Noel but had a "predisposed perception" that "sheet rockers," Noel's profession, use drugs. Trial record at 10:09:12 *et seq*. However, Juror 123 consistently stated he could be impartial and could render a verdict based solely on the evidence presented at trial.

Before resolving this issue, we must first address the Commonwealth's assertion that Noel failed to properly preserve the issue for

appeal by his failure to indicate on the juror strike sheet which additional juror he would have removed if the court had struck Juror 123 for cause. To properly preserve the denial of a motion to strike a juror for cause, the moving party must take the following three steps:

> (1) at the time peremptory challenges are exercised, the moving party uses a peremptory challenge on the juror whom the trial court refused to remove for cause, (2) the moving party lists on the jury strike sheet (Form AOC-013) *or states on the record* the name of another member of the jury panel the moving party would have removed by peremptory challenge if the motion to strike for cause had been granted, and (3) the other panel member who would have been struck peremptorily is selected to sit on the jury, such that the error cannot be considered harmless.

7 Kurt A. Phillips, Jr., David V. Kramer & David W. Burleigh, *Kentucky Practice—Rules of Civil Procedure* Rule 47.03 cmt. 6 (2018) (emphasis added).

Based on our review of the record on appeal, we conclude Noel sufficiently preserved the issue under the doctrine of substantial compliance. At a bench trial conference before the jury was seated, Noel's counsel orally named the additional juror upon whom he would have struck with a peremptory challenge. The Supreme Court has held this is sufficient to preserve the issue for appeal. *See Sluss v. Commonwealth*, 450 S.W.3d 279, 284-85 (Ky. 2014).

Thus, we begin our analysis by noting that Kentucky Rules of Criminal Procedure (RCr) 9.36(1) provides "[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." Generally, the circuit court enjoys discretion to determine if a potential juror is incapable of rendering a fair and impartial verdict and should be stricken for cause. The court's decision will not be reversed on appeal except for an abuse of discretion. *Grubb v. Norton Hospitals, Inc.*, 401 S.W.3d 483, 485 (Ky. 2013).

The fact that Juror 123 had a passing acquaintanceship with Noel and was predisposed to believe generally that "sheet rockers" used drugs is not sufficient to strike him for cause since the juror had no negative opinion about Noel personally and the case did not involve any evidence of drug usage or activity. Accordingly, Noel has failed to establish reasonable grounds to believe Juror 123 was unable to render an impartial verdict based upon the facts presented. We find no abuse of discretion by the trial court in not striking Juror 123.

We now turn to Noel's second and final argument, that being the trial court should have given a lesser-included offense instruction to the TBUT charge. Specifically, he contends the trial court should have instructed the jury on unauthorized use of an automobile or other propelled vehicle, a Class A misdemeanor. *See* Kentucky Revised Statutes (KRS) 514.100.

The trial court has a duty to instruct the jury on the law of the case. RCr 9.54; *Webb v. Commonwealth*, 904 S.W.2d 226, 228 (Ky. 1995). A jury

instruction upon a lesser-included offense should only be given where "the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense." *Id.* at 229 (citing *Luttrell v. Commonwealth*, 554 S.W.2d 75, 78 (Ky. 1977)).

The crucial difference between TBUT and unauthorized use of automobile is that TBUT requires that defendant take another's property "with intent to deprive him thereof" (KRS 514.030(1)(a)), while unauthorized use of automobile only requires that defendant "knowingly operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof." KRS 514.100(1). "Deprive" is defined in KRS 514.010(1) as:

> (a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other compensation; or
>
> (b) To dispose of the property so as to make it unlikely that the owner will recover it.

The gist of Noel's argument is that the jury could have believed he took the Buick without having the requisite "intent to deprive," in order to flee from the sheriff's officers and otherwise not deprive the owner of his property.

The Supreme Court has recently held that precedent provides that "the taking and abandoning of property could allow the jury to infer that the defendant

had the intent to withhold permanently the victim's property from the victim, i.e. intending that the property never be restored to the true owner." *Hall v. Commonwealth*, 551 S.W.3d 7, 15 (Ky. 2018). That court's ruling upholds the longstanding principle that intent may be inferred from a defendant's actions. *Id.* at 13, n. 9 (citing *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988)).

Of course, abandoning property taken without permission is not always sufficient to infer an intent to "deprive" an owner of his/her property. *Hall*, 551 S.W.3d at 13. Yet this case does not present unusual facts from which it could reasonably be inferred that Noel intended for the Buick to be restored to his neighbor.[1] Instead, this case involves typical facts usually seen when property is taken and then abandoned. The car was found three to four miles from Noel's neighbor's house and there was no evidence presented at trial that Noel intended to restore the vehicle to its rightful owner. Based on the totality of the circumstances of this case and absent evidence to support the instruction, it cannot be granted.

[1] The Supreme Court outlined in *Hall* the type of scenario in which it could be inferred that taken and then abandoned property was intended to be restored to its owner:

> A defendant who has seen the error of his ways but does not want to be caught, could abandon taken property in such a way as to restore ownership to the rightful owner, such as through placement of the property at the location of a third party known to the defendant. In this way, the defendant abandoned the property, but intended that the property be restored to the rightful owner.

551 S.W.3d at 13, n. 10. There is no evidence Noel saw "the error of his ways" or abandoned the vehicle at a location known to his neighbor.

See Logan v. Commonwealth, 785 S.W.2d 497, 498 (Ky. App. 1989). Because Noel's actions in this case were sufficient to give rise to a reasonable presumption that he intended to permanently deprive his neighbor of the Buick, the trial court did not err in refusing to instruct on unauthorized use of automobile. *See Hall*, 551 S.W.3d at 15 (holding that a trial court would not err by declining to instruct on unauthorized use of automobile if a jury could infer that a defendant intended to withhold permanently the victim's property).

For the foregoing reasons, the judgment of the Trigg Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven Nathan Goens
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Stephen F. Wilson
Assistant Attorney General
Frankfort, Kentucky