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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-000897-MR

CARNEIL ASKEW — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 17-CR-00417

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND TAYLOR, JUDGES.

COMBS, JUDGE: This appeal arises out of a judgment of conviction entered by the McCracken Circuit Court in which Appellant, Carneil Askew, was convicted of trafficking in less than eight ounces of marijuana, subsequent offense[1] and was sentenced to four-years' imprisonment. After our review, we affirm.

[1] Kentucky Revised Statutes (KRS) 218A.1421.

On January 6, 2017, Askew sold approximately one ounce of marijuana to Stephanie Sexton, a confidential informant for the Paducah Police Department. Sexton became an informant in order to avoid being charged with filing a false police report. This transaction was her first controlled buy.

Sexton contacted Detective Nathan Jaimet to inform him that she could buy marijuana from Askew. Sexton and Askew had known each other for about "two to three years" beforehand. After confirming Askew's identity, Detective Jaimet agreed to set up a controlled buy. While the detective was present, Sexton called Askew to arrange the purchase, and she agreed to buy one ounce of marijuana for $100 at Askew's "granny's house." Detective Gretchen Morgan searched Sexton before and after the controlled buy. Sexton recorded the transaction using a cellphone camera provided by the police department, and Detective Corey Willenborg filmed the exterior of the residence during the transaction.

Following a one-day trial on March 27, 2018, the jury found Askew guilty of trafficking in less than eight ounces of marijuana (subsequent offense). The trial court sentenced him to four-years' imprisonment. This appeal followed.

Askew raises two issues on appeal: (1) that the trial court erred in permitting the Commonwealth to provide an incorrect penalty for the offense

during *voir dire*; and (2) that the trial court erred in excusing a *venire* person who was qualified to serve on the jury.

First, we address Askew's assertion that the trial court allowed the Commonwealth to provide an incorrect penalty range during *voir dire*. Before *voir dire*, the Commonwealth informed the trial court of its intent to inform the jury panel the penalty range was up to twelve months (the penalty for a first offense) instead of the penalty of one to five years for a second or subsequent offense. The trial court agreed that this course of action was appropriate in order to avoid informing the jury of Askew's prior offenses. Askew did not raise an objection during this pre-trial discussion.

During *voir dire*, the Commonwealth asked the jury panel whether they could consider the full penalty range, which was up to twelve months. No one responded. The Commonwealth asked two more questions and concluded its *voir dire.* The trial court then took a twenty-minute recess. Before Askew began his *voir dire*, he objected to the penalty range as stated by the Commonwealth, arguing that it was misleading and unfair to him because he actually faced a much longer sentence. Askew requested that the trial court provide the panel with the correct penalty range, and the Commonwealth responded that twelve months was the only penalty available during the guilt phase of the trial. The trial court overruled Askew's objection, stating, "[T]he jury's not entitled to know of anything more,

and I think that for the charge of trafficking in marijuana under eight ounces that's the correct penalty range. So I'll deny anything, I'm not going to say anything additional."

The Commonwealth argues that Askew's objection was untimely. "Kentucky Rule of Criminal Procedure [(RCr)] 9.22 requires a party to render a timely and appropriate objection in order to preserve an issue for review." *Collett v. Commonwealth*, 686 S.W.2d 822, 823 (Ky. App. 1984). "[T]he purpose of the contemporaneous-objection rule is to afford the trial court an opportunity to prevent or cure any error in a timely fashion." *Polk v. Greer*, 222 S.W.3d 263, 265 (Ky. App. 2007). "[T]he general rule is that an objection is not timely unless it is made as soon as the basis for objection becomes apparent." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688 (Ky. 2009) (citations and internal quotation marks omitted). This Court has held "that an objection voiced less than one minute after the claimed error and before any other material phase of the trial had begun meets the 'contemporaneous objection' requirement[.]" *Polk*, 222 S.W.3d 263 at 265.

Askew objected after the Commonwealth finished its *voir dire*, following a twenty-minute break. Still, Askew's objection came only two questions after the issue arose and during the same phase of the trial. The trial

court would have been able to attempt curative measures at the time the objection was raised.

Assuming that Askew's objection complies with the contemporaneous-objection rule, we address the merits of his argument. Because "we have granted trial courts discretion to direct the scope of voir dire," we review for abuse of discretion. *Lawson v. Commonwealth*, 53 S.W.3d 534, 539 (Ky. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). The Commonwealth asks us to apply *Lawson* to the present situation. In *Lawson*, our Supreme Court held "voir dire should examine jurors' ability to consider only the penalty ranges for the *individual indicted offenses* without [persistent felony offender ("PFO")] enhancement." *Lawson*, 53 S.W.3d at 544 (emphasis added).

An enhanced sentence for a subsequent trafficking offense is not the same as a sentence enhanced by a PFO charge. PFO is a separately indicted charge that enhances the penalty of an underlying charge whereas a subsequent offense of marijuana trafficking is a single charge that carries an enhanced penalty. The charge of trafficking in less than eight ounces of marijuana, subsequent offense, carries a penalty of one to five years. We conclude that the trial court indeed

abused its discretion and should have required the Commonwealth to inquire whether the jury panel could consider the full range of the penalty of the offense charged as required by *Lawson*, which was one to five years. That clearly would have been the better procedure.

However, because the circuit court's erroneous ruling did not affect Askew's substantial rights, we hold this to have been harmless error under RCr 9.24.

> The test for harmless error is whether on the whole case there is a substantial possibility that the result would have been any different. The relevant inquiry is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction. Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial.

*Burchett v. Commonwealth*, 314 S.W.3d 756, 759 (Ky. App. 2010) (citations and internal quotation marks omitted). The Supreme Court of Kentucky treated as harmless the presentation of an erroneous penalty range during *voir dire* in *Williams v. Commonwealth*, 147 S.W.3d 1 (Ky. 2004), which involved a similar situation. In *Williams*, the defendant was charged with a Class C felony, which carries a penalty of five to ten years and would be enhanced by a second-degree PFO charge to ten to twenty years. *Id.* at 9-10. The trial court permitted "the Commonwealth to *voir dire* on a penalty range of one to twenty years." *Id.* at 10.

The Supreme Court held that any error was harmless as "the error was to Appellant's advantage because he was tried by a jury that expressed its willingness to impose a one-year sentence." *Id.*

In the case before us, the jury was apparently willing to impose a one-year sentence, which was the minimum for the offense charged. Under *Williams*, such error is deemed to be harmless. Furthermore, the trial court provided the jury with the correct one-to-five-year penalty range in its instructions. We conclude that there is no possibility that the result would have been different had the Commonwealth presented the jury panel with the correct penalty range during *voir dire*. Although the better practice would have been for the Commonwealth to *voir dire* on the correct penalty range for the offense charged, we hold that the error was harmless under the circumstances of this case.

Second, Askew argues that the trial court erred in excusing a qualified *venire* person. During *voir dire*, the Commonwealth asked if anyone on the jury panel had been charged with something more serious than a traffic ticket or if a family member or close friend had been. One member of the *venire* indicated that her uncle, brother, and fiancée had been prosecuted by the McCracken Commonwealth's Attorney for drug-related offenses. She expressed that she felt that the controlled buy process was "shady" and "unfair," but she said that she would try to be open-minded -- even though "there's way more worse drugs out

there." She further stated, "I would think he's guilty if someone was wired because there's no lying about that." The trial court excused this member of the *venire*, finding that "she would have a problem being fair."

We review a trial court's excusal of a juror for cause for abuse of discretion. *Wallace v. Commonwealth*, 478 S.W.3d 291, 298 (Ky. 2015).

> Striking a juror for cause simply will not constitute a reversible abuse of discretion absent evidence of systematic exclusion (e.g., on the basis of race or gender) that undermines the fairness of the entire jury process. In sum, when a trial court strikes a juror for cause, there is little for a defendant to complain about except that, as here, the juror possibly held views favorable to an acquittal.

*Id.* at 298-99 (citations and internal quotation marks omitted). Here, the excused person's responses indicated that she might not have been an impartial juror. The Supreme Court of Kentucky has held "if a juror falls in a gray area, [she] should be stricken." *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013). The trial court found that the person in question could be biased against either side and chose to strike her. Therefore, the trial court did not abuse its discretion in excusing this member of the *venire*.

We AFFIRM the judgment of the McCracken Circuit Court.

ALL CONCUR.

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