

RENDERED: JULY 26, 2019; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001015-MR

DELWAN LAMONT BOOKER, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 16-CR-003103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, NICKELL, AND K. THOMPSON, JUDGES.

MAZE, JUDGE: Appellant Delwan Lamont Booker, Jr. (“Appellant”) appeals from a May 25, 2018, judgment of conviction and sentence, asserting the trial court abused its discretion in refusing to strike for cause prospective Juror #35. After a careful review of the record, we affirm.

I. BACKGROUND

On October 17, 2016, two men robbed the cashier of JR's Quick Mart, located in Jefferson County, Kentucky. The men each drew guns on the cashier, a fifteen-year employee, and took the money in the cash drawer as well as the cashier's iPod media player. Appellant was identified from surveillance video. He waived his *Miranda*¹ rights and admitted to the robbery.

Appellant was indicted on five counts: robbery in the first degree, two counts of possession of a handgun by a convicted felon, fleeing or evading police in the first degree, and receiving a stolen firearm. Following a jury trial, on February 8, 2018, Appellant was convicted of robbery in the first degree² and one count of possession of a handgun by a convicted felon.³ The jury recommended a sentence of twelve (12) years for the robbery conviction, to run consecutively with a sentence of seven (7) years for handgun possession, for a total recommendation of nineteen (19) years. Appellant pled guilty to the remaining counts in the indictment on February 22, 2018. On May 25, 2018, the trial court entered a judgment of conviction and sentence, sentencing Appellant to a total of twelve (12) years' imprisonment, with all time to run concurrently.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

² Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

³ KRS 527.040, a Class C felony.

During *voir dire*, prospective Juror #35 stated that her husband and brother were victims of an armed robbery at a family-owned business. Juror #35 was not present during the robbery. She indicated the experience would not affect her ability to impartially hear Appellant's case. Although portions of the record are inaudible, Juror #35 stated: "No, 'cause I don't think it ever went to trial." She then stated: "Kind of a [inaudible], thought I'd bring it up anyway."

The trial court denied Appellant's motion to strike Juror #35 for cause. Appellant used a peremptory strike to dismiss Juror #35.

II. ANALYSIS

Appellant adequately preserved this issue because his counsel noted on the juror strike sheet that he would have used a peremptory strike to exclude Juror #20 if the motion to strike Juror #35 for cause had been granted. Juror #20 sat on the jury that convicted Appellant. *See Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009) ("[T]his Court concludes that in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck [S]uch an error can be shown to be non-prejudicial if the other jurors the defendant would have used his peremptory strikes on do not actually sit on the jury"). We therefore turn to the merits of Appellant's allegation of error.

A defendant is entitled to an impartial jury. “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.”

Kentucky Rule of Criminal Procedure (RCr) 9.36(1). Moreover:

[W]hen there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken. The trial court should err on the side of caution by striking the doubtful juror. . . . [W]here questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused.

Sturgeon v. Commonwealth, 521 S.W.3d 189, 194 (Ky. 2017) (citation omitted).

“To determine whether a reasonable ground existed to doubt the challenged juror’s ability to render a fair and impartial verdict, the trial court must weigh the probability of bias or prejudice based on the entirety of the juror’s responses and demeanor.” *Id.* at 195 (citation and internal quotation marks omitted). “In the final analysis, whether 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.” *Id.* at 192 (citation and internal quotation marks omitted).

In *Little v. Commonwealth*, 422 S.W.3d 238, 243 (Ky. 2013), the defendant was convicted of two counts of first-degree assault, first-degree wanton

endangerment, operating a motor vehicle under the influence of alcohol (DUI) and other offenses. On appeal, the defendant argued the trial court abused its discretion in refusing to remove a potential juror who stated, in *voir dire*, that her husband, mother, and younger sister “had been killed in two separate accidents caused by drunk drivers.” *Id.* at 241. The defendant struck the potential juror using a peremptory strike. The Court held the trial court did not err in refusing to strike the juror for cause, explaining:

We are satisfied that Juror Wright’s answers were sufficient to withstand a motion to strike for cause, as she explained that her personal tragedies would not affect her ability to listen to the evidence, follow the court’s instructions, and render a fair and impartial verdict.

Id. at 243. *See also Dunn v. Commonwealth*, 360 S.W.3d 751, 770 (Ky. 2012) (two prospective jurors not automatically excused in prosecution for sodomy because they had family members who were victims of sexual abuse); *Brown v. Commonwealth*, 313 S.W.3d 577, 598 (Ky. 2010) (“[T]he mere fact that a prospective juror has been the victim of a crime similar to the crime being tried does not by itself imply a disqualifying bias. Additional evidence of bias is required.”); *Woodall v. Commonwealth*, 63 S.W.3d 104, 118 (Ky. 2001), *as amended* (Jan. 15, 2002) (in prosecution for rape, kidnapping, and murder, “the allegation that [the prospective juror] was impaired because her sister had been raped is without merit. The refusal to strike jurors for cause because they had

previously been victims of violent crimes has been repeatedly upheld.”); *Hodge v. Commonwealth*, 17 S.W.3d 824, 838 (Ky. 2000), *as modified on denial of reh’g* (June 15, 2000) (in prosecution for robbery and murder, “[t]he facts that Juror No. 72 had been the victim of a burglary and theft and that Juror #73’s neighbors had been murdered did not warrant excusal of either juror for cause.”) (Internal citation omitted).

In the case *sub judice*, Appellant asserts the Commonwealth agreed that the trial court should strike Juror #5 for cause. Juror #5 worked as a teller during a bank robbery. She spoke to the robber before he moved on and gave the robbery note to the teller next to her. She described the experience as either “very dramatic” or “very traumatic,”⁴ and stated that it was “very unsettling.”

Appellant argues because Juror #5 was struck for cause, Juror #35 should have been also. However, in comparing the record, Juror #5 made unequivocal statements that she found her personal experience in a bank robbery to be “dramatic” or “traumatic” and “unsettling.” There was no similar evidence with respect to Juror #35. When asked, out of the presence of the prospective jurors, to explain his motion to strike Juror #35 for cause, Appellant’s counsel stated:

My concern there is . . . she was a victim indirectly to that business robbery . . . that’s really close to home I think to the facts of this case . . . that’s my concern.

⁴ The audio was unclear on this point, but the parties agree Juror #5 either said “very dramatic” or “very traumatic.”

The trial court ruled: “I understand. That’s not sufficient to withstand for cause though.”

With respect to Juror #35, Appellant did not identify any particular statement or change in her demeanor during *voir dire* which would constitute a “reasonable ground” to believe she could not be fair and impartial. The trial court did not abuse its discretion in finding the fact that Juror #35’s family members had been the victims of an armed robbery, standing alone, did not require her to be excused for cause.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment and sentence of the Jefferson Circuit Court, entered May 25, 2018.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cicely J. Lambert
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Kristin L. Conder
Assistant Attorney General
Frankfort, Kentucky