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RENDERED: JUNE 12, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0807-MR

FINAL
DATE 7-3-03 EWA GROW+DC

RICHARD WAGERS

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
CASE NO. 01-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Richard Wagers, was convicted in Fayette Circuit Court on one count of First-Degree Sodomy and two counts of First-Degree Sexual Abuse and sentenced to a total of thirty-five years imprisonment. The convictions stemmed from allegations of abuse by the seven-year old daughter of Appellant's then-girlfriend, who testified that Appellant had touched her private parts with his hand, his private part, and his tongue, while he was babysitting the victim on a day home from school. He appeals as a matter of right. Ky. Const. § 110(2)(b).

Appellant alleges several errors on appeal, specifically: (1) that he was denied a fair and impartial jury when the trial court failed to follow the mandated procedures for jury selection; (2) that the trial court erroneously failed to strike six jurors for cause, thereby requiring the defense to use its peremptory challenges to remove the jurors; (3) that the two counts of Sexual Abuse I should have merged with the count of Sodomy I,

as there was only one incident of abuse; and (4) that the trial court should have granted a directed verdict on the charge of Sodomy I, as there was no evidence that oral contact was made with the victim's vagina. For the reasons set forth below, we affirm.

JURY SELECTION PROCESS

Appellant argues that the trial court failed to follow prescribed jury selection procedures when it empanelled the jury from only twenty-six available venirepersons, rather than the twenty-eight he contends is required by RCr 9.40 and KRS 29A.060. When the trial court realized that there were only twenty-six potential jurors left after nineteen had been struck for cause, rather than replenishing the potential panel with an additional two venirepersons, the court asked the Commonwealth to give up two of its peremptory challenges. The Commonwealth agreed, but defense counsel objected, stating that he was entitled to choose from a full panel of twenty-eight.

A criminal defendant in a jury trial in circuit court is entitled to a jury of twelve persons, and both the Commonwealth and the defense are each allotted eight peremptory challenges. RCr. 9.40(1); RCr. 9.30(1); Ky. Const. § 7. Therefore, a total of twenty-eight venirepersons were necessary to properly empanel the jury in this case. RCr. 9.36(2). RCr. 9.30 states in pertinent part:

(1)(a) In a jury trial in circuit court the clerk, in open court, shall draw from the jury box sufficient names of the persons selected and summoned for jury service to compose a jury as required by law. If one or more of them is challenged, the clerk shall draw from the box as many more as are necessary to complete the jury.

....

(1)(c) When it appears that the names in the jury box are about to become exhausted, the judge may obtain additional jurors by drawing from the drum, or, with the consent of the parties, by ordering the sheriff or a bailiff appointed by the

court to summon any number of qualified persons.

Appellant's argument on appeal focuses on the randomness of the jury selection employed by the trial court and relies upon Robertson v. Commonwealth, Ky., 597 S.W.2d 864 (1980). In Robertson, this Court reversed a criminal conviction without any showing of prejudice to the defendant, because the trial court had allowed a substantial deviation from the jury selection process mandated by RCr 9.30 and KRS 29A.060. Id. at 865. There, the trial court began with thirty-six jurors and initially filled the jury box with jurors 1 through 12. As certain jurors were excused, the court replaced them with the next lowest-numbered juror in consecutive order. This method, in effect, allowed the parties to determine which jurors would be seated if certain jurors were struck. "[P]reservation of randomness is a central principle in the jury selection process. However, 'randomness means that, at no time in the jury selection process will anyone involved in the action be able to know in advance, or manipulate, the list of names who will eventually compose the . . . jury.'" Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 840 (2000) (quoting Williams v. Commonwealth, Ky. App., 734 S.W.2d 810, 812-813 (1987)).

In the situation at bar, the trial court's request for the parties to forego peremptory strikes rather than empanel two additional jurors, does not rise to the level of deviation that deprived the defendant in Robertson of a jury selected at random. There was no way that either party could have manipulated the composition of the jury or known in advance which jurors would have eventually sat on the panel. "We would not consider minor errors in jury selection reversible in the absence of a showing of prejudice." Robertson, supra at 865. Appellant cannot show how he was prejudiced by

the court's failure to empanel two additional jurors that either party may have ultimately peremptorily challenged. Accordingly, we hold that the trial court in this instance, substantially complied with RCr 9.30 and KRS 29A.060 governing the jury selection process.

JURORS NOT STRUCK FOR CAUSE

Appellant contends that the trial court erred when it refused to excuse six jurors for cause due to various biases against the defense.

None of the six jurors that Appellant argues should have been excused as unqualified actually sat on the jury. However, Appellant exhausted all eight of his peremptory strikes, and thus he is entitled to challenge the composition of the jury. Marsch v. Commonwealth, Ky., 743 S.W.2d 830 (1987). "To obtain a reversal for infringement of his right to exercise peremptory challenges, appellant need only show that the trial court erred in overruling any one of his challenges for cause." Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 865 (1993), overruled on other grounds, Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997) (quoting Marsch, supra, at 834).

Appellant sets out four primary reasons for the challenges to the six individual jurors not struck for cause, specifically that: (1) several jurors were unable to state unequivocally that they could be impartial; (2) some jurors were victims of past sexual abuse; (3) several jurors indicated that they would tend to believe either witnesses for the prosecution or children; and (4) several jurors indicated a tendency to impose the maximum punishment.

The decision of whether to excuse a juror for cause is within the sound discretion of the trial court, Alexander, supra, at 864, and "great deference is afforded that

decision in the absence of an abuse of discretion." Mills v. Commonwealth, Ky., 95 S.W.3d 838, 842 (2003). Here, the trial court did not abuse its discretion in refusing to excuse any of the challenged jurors for cause. Two of the jurors were sexually abused as children but each ultimately stated that they could set aside their experience and be fair. These same two jurors also stated that they "would have a tendency to believe kids," or that they would "possibly" be inclined to automatically believe what the children said. "[T]he mere fact that a person has been the victim of a similar crime is insufficient to mandate a prospective juror be excused for cause." Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 299 (1997). The trial court observed first hand the responses and demeanor of these jurors and clearly felt that they were capable of rendering a fair and impartial verdict based solely on the evidence. We cannot say that the refusal to excuse these two jurors for cause was an abuse of discretion. Therefore, no error occurred.

Likewise, excusal for cause is not mandated simply because a juror favors severe penalties if he or she ultimately states that they will consider the full range of penalties. Woodall v. Commonwealth, Ky., 63 S.W.3d 104, 119 (2001), cert. denied, 123 S. Ct. 145, 154 L. Ed. 2d 54, 71 U.S.L.W. 3236 (2002); Grooms v. Commonwealth, Ky., 756 S.W.2d 131, 137 (1988) ("[A] juror should be excused for cause if he would be unable in any case, no matter how extenuating the circumstances may be, to consider the imposition of the minimum penalty prescribed by law."). Several of the jurors here, when asked by defense counsel if they would go straight to the maximum penalty if the defendant was found guilty, initially equivocally stated that they probably would favor the maximum. However, when questioned by the Commonwealth, the jurors stated that

they would be able to consider the entire range of penalties before making their decision. The trial court was satisfied, as are we, that the jurors were not biased, as their responses to the Commonwealth were not merely serving to "rehabilitate" otherwise unqualified jurors. See Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 718 (1991). There was no error.

DOUBLE JEOPARDY AND SUFFICIENCY OF THE EVIDENCE

Appellant also contends that his convictions on the two counts of Sexual Abuse I (one count as a lesser-included offense of Rape I, and one count as a primary offense for touching the victim's vaginal area with his hand) should have merged into the conviction for Sodomy I because the sexual contact constituting the basis for those charges was merely incidental to the contact required for the act of sodomy. Alternatively, Appellant argues that he should have been granted directed verdicts on both Sexual Abuse I charges, as there was not sufficient evidence to submit those charges to the jury.

Appellant's initial argument is grounded upon double jeopardy principles and he further directs us to Turner v. Commonwealth, Ky., 767 S.W.2d 557, 558 (1988), where we held a defendant's conviction for first-degree sexual abuse merged into his conviction for first-degree rape because the evidence showed the sexual contact involving the defendant's hand was only incidental to the accomplishment of the rape; and therefore, conviction for both offenses constituted double jeopardy.

In the case at bar, the evidence of the alleged acts of abuse consisted entirely of the victim's testimony that Appellant had touched her private parts with his hand, private part, and tongue over the course of one day. The evidence does not show that

the touching by Appellant's hand or penis was in any way incidental to the accomplishment of the sodomy. Therefore, the two separate charges of Sexual Abuse I (as a primary offense, and as a lesser-included offense of Rape I) that arose from the contact with Appellant's hand and penis, respectively, were based on separate acts of "sexual contact" and were not merely incidental to the touching with Appellant's tongue. The fact that the three acts may have occurred close in time to one another is irrelevant. See Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 739-740 (1984). Accordingly, Appellant was properly charged and convicted of three separate offenses.

Appellant's alternative argument that he was entitled to a directed verdict on both counts of Sexual Abuse I is rejected. Although the victim's testimony was lacking in detail, there was sufficient evidence that a reasonable juror could have believed the appellant was guilty of each instance of sexual abuse. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

DIRECTED VERDICT ON SODOMY I

Appellant also asserts that the trial court erred when it refused to grant his directed verdict on Sodomy I because there was no evidence that Appellant's tongue actually touched the victim's vagina. This argument is also rejected because based on the evidence it would not have been clearly unreasonable for a jury to find Appellant guilty of Sodomy I. Id. The victim testified, although briefly, that the appellant had touched her private parts with his tongue. The jury is entitled to believe her testimony. Therefore, the trial court did not err in refusing to grant Appellant a directed verdict on Sodomy I.

Accordingly, the judgment of conviction against Appellant, Richard Wagers, is affirmed.

Lambert, C.J.; Cooper, Graves, Johnstone and Wintersheimer, JJ., concur. Keller, J., concurs in result only and would hold that the trial court erred in failing to remove one or more jurors for cause, but that the error was harmless in this case because Appellant exercised his peremptory challenges to cure the error. See Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 374-375 (2002) (Keller, J., dissenting); Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 813-818 (2001) (Keller, J., dissenting). Stumbo, J., dissents by separate opinion.

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CASE NO. 01-CR-00072

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DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, I must dissent from the majority opinion. I believe that one of the jurors, who had herself been a victim of sexual abuse as a child, should have been stricken for cause, as there were reasonable grounds to believe that this juror could not have rendered a fair and impartial verdict on the evidence. RCr 9.36.

Juror #444 admitted to having been sexually abused as a child and during voir dire was questioned as follows:

DEF: Okay, which of the questions did I ask were you going to tell us about?

JUROR: Actually, it's one of the earlier ones that you had brought up. I've been a victim of child abuse, and obviously, I know that it's very impactful and can affect many facets of a person's life. I think that I'm capable of listening to evidence and being fair, but I thought that you would want to know.

DEF: Sure, I would assume that sitting through a case like this would make you feel extremely uncomfortable.

JUROR: It could, but you know, I still feel that hearing the evidence and stuff I could try to be impartial, but at the same time, it could.

DEF: Do you think that you would lean toward the prosecution a little bit or . . .

JUROR: I would like to think no, you know, I mean, I would like to think, I mean, you need to know where I'm coming from.

DEF: Oh, absolutely, we want people to come up here and tell us the truth, we appreciate it.

JUROR: You know, just because something happened to me, I wouldn't want to pin it on somebody that I didn't think deserved to have that pinned on. I mean, I think that I'm capable of determining whether or not I think this man did it or not. But, you know, if you, if you think that, you know, in the, should we choose him to be guilty, you know, if you think that my experience would impact my thoughts toward the sentence or anything like that, you know, I don't know.

DEF: Well, let's talk about that. The judge explained earlier that there's two parts to the trial in Kentucky. There's the guilty/not guilty and then there is the sentencing. And, in the sentencing, the judge would give you a range of penalties. If you found him guilty, do you think you would go to the maximum penalty?

JUROR: Well, I think I would try my best to do, to judge by what I thought he was guilty of. Like you mentioned crime A, B, or C, if I thought he was guilty of A then so be it.

COM: So, when we get right down to it, could you consider the full range of penalties?

JUROR: I don't know how to answer that, I've never been a juror before, you know. So, this is kind of a new thing. I don't know how to say that, but for me to tell you that, there is more involved with what these kids are going through than what just is on paper or comes out in trial. I can tell you first-hand it's going to take a long time for these kids to work through it. So, I don't know, I mean it's a complicated issue. I don't know how to tell you, I don't think I would say, "hey, give this guy the max based on that."

COM: Would you at least consider, if the judge tells you that the range is X to Y to Z, would you at least consider the full range before you made any decision on penalty?

JUROR: Yeah.

DEF: Do you think that you would, with what you went through, do you think that you would be inclined to automatically believe what the children say if the children get up here and testify?

JUROR: Possibly, yeah I would have to say that possibly, I would.

DEF: Okay.

COM: Depending on whether you found them to be truthful or not, I mean, possibly you would, but does that mean you wouldn't, possibly you would think they're lying after you heard them testify?

JUROR: Yeah, just you know, I really do think, you know, I've worked very hard on this issue personally, so I would like to think I could, you know, weigh all of it and try to, you know, and see this as a distinct separate issue, you know. I think I would not take it personally or anything, but I also think that you all, you know, the whole idea of the trial is to define a number as far as their injury is concerned, it's hard to put a number to that.

DEF: You mean penalty wise or . . .

JUROR: No, the amount of suffering that the kids have endured, it's hard to talk to a kid that is maybe 10 or 11 and understand the scope of their injury is what I mean.

DEF: Because it's going to affect them the rest of their lives?

JUROR: Yeah, so with that in mind.

DEF: Okay, I don't have any more questions, the judge may have some.

"The exercise of the sound discretion of the trial judge must be accomplished consistent with the right of the defendant to a fair and impartial jury. Composition of the jury is always vital to the defendant in a criminal prosecution and doubt about unfairness

is to be resolved in his favor." Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 939 (1999).

In refusing to strike Juror #444 for cause, the trial court stated that although the juror had been the victim of past sexual abuse, she had gone to great lengths to explain that she could listen impartially to the evidence presented. I do not agree that this juror's responses indicated that she was capable of being completely impartial.

Juror #444 was very honest about her attempts to come to grips with the events of her past, yet her struggle was evident in her response that she "would try to be impartial" when evaluating the evidence. Although bias is not automatically presumed if a juror has been the victim of a similarly violent crime, see Woodall v. Commonwealth, Ky., 63 S.W.3d 104 (2001), cert. denied, 123 S. Ct. 145 (2002); this, accompanied by the equivocal nature of Juror #444's responses regarding her ability to put her past experience behind her and listen impartially to the evidence, gives me reasonable grounds to believe that this juror was not capable of rendering a fair verdict. The Commonwealth's inquiries with regard to her ability to be impartial and whether she could at least consider the entire range of penalties before going straight to the maximum sentence, does not "rehabilitate" a juror who "should [have been] considered disqualified by [her] personal knowledge or [her] past experience, or [her] attitude as expressed on voir dire." Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 865 (1993), overruled on other grounds, Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997) (quoting Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 718 (1991)). "A trial court's decision whether a juror possessed 'this mental attitude of appropriate indifference' must be reviewed in the totality of circumstances. It is not limited to the juror's response to a 'magic question.'" Montgomery, supra, at 718.

Even though the juror did eventually say that she would consider the entire range of penalties, the response came after several leading questions from the Commonwealth. Accordingly, I feel that in light of Juror #444's entire comments, the trial court abused its discretion when it refused to strike this juror for cause.

Also, since I would reverse and remand for a new trial, upon remand I would direct the trial court to examine the evidence more closely to determine if there is, in fact, any evidentiary support for the two separate counts of Sexual Abuse I. If the court finds that the sexual contact with Appellant's hand was merely incidental to the accomplishment of the contact with Appellant's penis or tongue, then double jeopardy would preclude a conviction based upon that conduct as a separate incident of abuse. Turner v. Commonwealth, Ky., 767 S.W.2d 557, 558 (1988).