

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2003-SC-0820-MR

DATE 12-16-04 ELLA Graw-H.D.C.

FELIX LAZARO ALDAMA GIHON

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
2002-CR-1563

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Felix Gihon, was convicted of one count of intentional murder and was sentenced to twenty years' imprisonment. He appeals as a matter of right. Because the trial court denied Gihon's motion to strike a juror who strongly indicated that she could not consider finding a lesser-included offense, we reverse the judgment of the Jefferson Circuit Court.

The Crime

Gihon killed the woman he had lived with for over five years. On the night of the murder, the victim came to their home from work, made a phone call and then left. She told Gihon that she was going to meet a friend. Gihon hit the redial button on the phone. A man answered. When the victim returned some four hours later, Gihon and the victim got into an argument. It escalated. Gihon grabbed a knife and fatally stabbed his girlfriend.

The Defense

Gihon did not deny killing his girlfriend. Defense counsel conceded Gihon's criminal responsibility during opening statement. But he did not concede the level of that responsibility. Gihon's sole defense was that he suffered from extreme emotional distress at the time of the homicide. So his defense was to convince the jury to convict him of the lesser-included offense of first-degree manslaughter.

The Error

During voir dire, Juror #40 approached the bench. She, the juror, explained that she would not be particularly "unbiased" if "domestic violence" played a factor during the defendant's trial. She said that she would not see domestic violence as an excuse for harming or killing someone. The juror explained that she believed that people should be in control of themselves when dealing with a domestic partner. She used herself as an example. While she might get mad at her husband, she would never hit or kill him as a reaction to her anger. She all but stated in technical terms that she could not consider Gihon's EED defense and could not vote to convict him of a lesser-included offense.

In attempting to rehabilitate the juror, the prosecutor focused on the juror's ability to consider the entire penalty range. In reply, the juror stated that she could fairly hear all of the evidence and consider it. But she added that if the evidence included domestic violence, then she would have feelings about that that would not help the defendant.

The defense moved to strike Juror #40 for cause arguing that she stated that she would be biased or slanted against the defense's theory of the case in the guilt phase. The trial court noted that the juror stated that she would listen to all the evidence fairly and could consider the entire penalty range. Thus, the trial court denied the motion to

strike. But the trial court failed to consider the impact of the juror's stated bias on Gihon's defense during the guilt phase.

The sole consideration in ruling on a motion to strike for cause "is the probability of [juror] bias or prejudice." Pennington v. Commonwealth, Ky., 316 S.W.2d 221, 224 (1958). Juror #40 candidly admitted that she would be biased against Gihon if his defense in any way involved a physical reaction to an emotional domestic situation. This bias went to the heart of Gihon's only defense which was seeking a conviction on manslaughter first-degree based on extreme emotional disturbance in the guilt phase. This goes beyond the probability of prejudice. It is an affirmative assertion of it. And, the Commonwealth's attempted rehabilitation went only to whether Juror #40 could consider the full range of penalties in the sentencing phase. It did not attempt to address the juror's stated bias regarding the EED evidence. We, therefore, hold that the trial court abused its discretion in denying Gihon's motion to strike Juror #40 for cause. See Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 864 (1993), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997).

The Result

Gihon used his last peremptory challenge to remove Juror #40 from the venire. Therefore, we presume prejudice and reversal is required. Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 374 (2002). Accordingly, we reverse the judgment of the Jefferson Circuit Court and remand for a new trial.

Lambert, C.J.; Cooper, Johnstone, and Stumbo, JJ., concur. Graves, Keller, and Wintersheimer, JJ., dissent without opinion.

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