

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: JUNE 15, 2006  
AS AMENDED: JUNE 19, 2006  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-000562-MR

DATE 7-6-06 E. A. G. Smith, P.C.  
APPELLANT

STEVEN WAYNE ASHBAUGH

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
NO. 02-CR-000736

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Steven Wayne Ashbaugh, was convicted of one count of robbery in the second degree and of being a persistent felony offender in the first degree. Appellant was sentenced to an enhanced term of twenty years of imprisonment. This appeal is as a matter of right.<sup>1</sup> At issue in this case is Appellant's claim that failure of the trial court to excuse three prospective jurors during voir dire requires reversal for a new trial.

On March 14, 2002, Appellant entered a PNC banking center located at 9804 Old Third Street Road in Jefferson County. Appellant presented a teller a note on the back of a pay check stub bearing his name and address, as follows: "Don't make any sudden moves. I'm ready to die. Are You? Count out the 100s 50s 20s." The teller complied and Appellant left the bank with approximately \$4,000.00 from the teller's

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<sup>1</sup> Ky. Const. § 110(2)(b).

money drawer, and \$460.00 from the teller's personal deposit. With the assistance of his family, Appellant was located and arrested within six days following the bank robbery. Subsequently, on March 27, 2002, Appellant was indicted by a Jefferson Circuit Court Grand Jury on charges of one count of robbery in the first degree and one count of being a persistent felony offender in the first degree. On June 14, 2004, Appellant was convicted of robbery in the second degree and of being a persistent felony offender in the first degree. He was sentenced to twenty years as recommended by the jury.

Appellant argues that the trial court erred with respect to its failure to exclude three prospective jurors from the case. Appellant asserts that the trial court abused its discretion by failing to excuse for cause all of the three challenged jurors. Specifically, two of the jurors had informed the court that they had been victims of robberies in the past. The third juror asserted that he had a propensity to "phase out" in regard to defense counsel's questioning regarding his ability to give the case his undivided attention.

Appellant relies on the language of RCr 9.36(1) in support of his argument. "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."<sup>2</sup> This Court recognized in Commonwealth v. Lewis<sup>3</sup> that "determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous,

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<sup>2</sup> RCr 9.36(1).

<sup>3</sup> 903 S.W.2d 524 (Ky. 1995).

an appellate court will not reverse the trial court's determination."<sup>4</sup> In the present case, the trial court determined that prior robberies committed against two of the jurors were not sufficient justification to exclude them from Appellant's case. During the Commonwealth's questioning during voir dire, both jurors gave satisfactory assurance that their past experiences of being robbed would not prevent them from being fair and maintaining a presumption of innocence for Appellant. Such responses are reasonable and portray individuals who can be fair and impartial, rather than possessing prejudice or bias. As stated in Lewis, deference must be paid to the trial judge's "determination as to whether to exclude a juror for cause" and "[a] party must show prejudice to obtain reversal."<sup>5</sup>

The fact that both jurors had prior experience as robbery victims does not, as Appellant suggests, decide the issue. The trial court's decision to overrule Appellant's motion to excuse these two jurors was appropriate because there was nothing shown that "would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths."<sup>6</sup>

Another juror was challenged by Appellant based on his admission that he had a propensity to "phase out" or lose concentration and would be unable to focus on the case throughout its duration. The trial court denied Appellant's motion to strike the juror. As asserted by the Commonwealth, this statement in no way indicates that the juror would be unable to return an impartial verdict. Thus, there was no abuse of discretion by the trial court in overruling Appellant's motion to excuse this juror.

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<sup>4</sup> Id. at 527.

<sup>5</sup> Id.

<sup>6</sup> Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (citing Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 2523, 65 L.Ed.2d 581 (1980)).

Since the trial court “is vested with discretion in deciding whether [a] juror should be excused for cause,” deference is granted to the decision.<sup>7</sup> The trial court must decide whether a prospective juror can “conform his views to the requirements of the law and render a fair and impartial verdict.”<sup>8</sup> Nothing presented here reveals an abuse of trial court discretion.

Accordingly, the judgment of conviction is affirmed.

Lambert, C.J., and Cooper, Graves, Johnstone, Roach, Scott, and Wintersheimer, JJ., concur.

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<sup>7</sup> Humble v. Commonwealth, 887 S.W. 2d 567, 569 (Ky. App. 1994).

<sup>8</sup> Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994).

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