IMPORTANT NOTICE

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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-0273-MR

KEVIN MICHAEL RAIFORD — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
04-CR-1059

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Fayette Circuit Court jury convicted Kevin Michael Raiford of first-degree robbery, receiving stolen property over $300, and being a persistent felony offender in the first-degree. In accordance with the jury's recommendation, the trial court sentenced Raiford to 35 years in prison. Thus, he appeals to this Court as a matter of right. The single issue on appeal is: did the trial court err in denying Raiford's motion for a new trial after the complaining witness on the robbery charge notified the Commonwealth's Attorney after the trial but before final sentencing that he recognized one of the jurors as a customer of his gas station. Because we conclude that the trial court did not abuse its discretion in deciding that Raiford did not meet his burden of proof on the issue of undisclosed juror bias, we affirm.

Because this appeal is limited to one issue, our focus will be on the facts related to that issue and not on the facts underlying the conviction. We will not recount those

facts other than to state that Raiford was convicted of robbing Andy Aullman on July 17, 2004, while Aullman was working at the Marathon Gas Station located at 1100 South Broadway in Lexington, Kentucky. Consequently, Andy Aullman's trial testimony was crucial to Raiford's conviction.

I. Facts Related to the Issue of the Relationship between the Juror and the Complaining Witness and the *Voir Dire* Proceedings

For the time period of around July 2003 to August 2004, the juror, Donna Holland (juror number 746), had been a customer of the gas station that Andy Aullman owned and where he also worked. Of further coincidence, on December 15, 2004, just before Aullman testified at Raiford's trial, he took several bad checks written to his station to the office of the Commonwealth's Attorney for prosecution. Holland had written two of those checks totaling $600.

During the *voir dire* before impaneling the 12–member jury, the Commonwealth's Attorney informed prospective jurors of the witnesses whom she would call. The purpose of reading the names of the witnesses was to determine if anyone knew any of the witnesses, and, if so, to allow the attorneys and the court to explore the nature of the relationship and ascertain any biases. The Commonwealth's Attorney stated that she would call Andy Aullman who owns the Marathon Gas Station on South Broadway.

After the Commonwealth's Attorney read her witness list, the trial court followed up and asked if any members on the panel recognized any of those names as persons with whom he or she might have had an association or dealings in the past. Donna Holland, who eventually became a juror, did not respond that she knew Andy Aullman. Nor did she respond when the trial court asked if anyone recognized the Marathon Gas Station on South Broadway, where the robbery occurred.

After the trial, but before final sentencing, the office of the Commonwealth's Attorney served Donna Holland with notice of the check charges. In response to the notification, Holland contacted Aullman on December 18, 2004. She told him that she had filed Chapter 13 bankruptcy, and she believed that he had been listed as a creditor and that the checks had been taken care of. She asked him if she could make payments to him, but he told her that he wanted to proceed with the prosecution.

II. Raiford's Motion for a New Trial

Four days after speaking with Holland, Aullman contacted the Commonwealth's Attorney who had prosecuted Raiford's case to notify her of his contact with Holland. In turn, the Commonwealth's Attorney notified Raiford's attorney and the trial court. Raiford's attorney made a motion for a new trial on the ground of undisclosed juror bias.

The trial court heard Raiford's motion on February 7, 2005, and conducted an evidentiary hearing. During the evidentiary hearing, Raiford called Aullman and Holland to testify.

III. Aullman's and Holland's Testimony at the Evidentiary Hearing

Aullman testified that he recognized Holland when he was testifying in Raiford's trial. He recognized her as a customer of the Marathon station. Aullman cashed her payroll and personal checks every couple of weeks, for which he would charge a fee of two percent. Sometimes, she would ask him to hold her personal checks for a couple of days before he deposited them, and he would do as she asked.

Aullman and Holland never engaged in more than a typical cashier-customer conversation. Aullman did not call her by name, and he could not recall if she called him by name. The last time she had been in the station was about six months ago, which was July or August of 2004. At that time, he cashed two of Holland's personal

checks, which were each in the amount of $300. Aullman later discovered that both checks were bad.

Holland recognized Aullman by sight when he testified at Raiford's trial. She did not, however, recognize his name when asked during *voir dire* as she only knew Aullman by the nickname that she heard her co-workers use, which was "Scrap." Nor did she recognize the address of the Marathon station because there were several Marathon stations on South Broadway, and no one provided the cross-street, which would have triggered her memory.

Once she recognized Aullman at trial, Holland did not believe she needed to alert the court because she reflected back on the *voir dire* proceedings and the follow-up questions asked of a member of the panel after responding that he or she knew a witness. The follow-up questions typically related to whether the juror believed that he or she could be fair and impartial in light of knowing a witness. Because Holland believed that she could still be fair and impartial, she did not alert the trial court that she knew Aullman.

At the time of Raiford's trial, Holland was not aware that the checks she cashed at the Marathon station were outstanding and that she owed money to Marathon. She only thought something about her circumstances with Aullman after the Commonwealth's Attorney's office served her with notice of the check prosecution.

IV. Trial Court's Ruling on the Motion for a New Trial

At the conclusion of the evidentiary hearing, the trial court held that Raiford had not met his burden of proving that Holland had willfully concealed anything in *voir dire*. In so holding, the trial court made two factual findings on the video record that we find important to our review: (1) that Holland did not recognize Aullman's name or the

particular Marathon station when read during *voir dire*; and (2) that Holland did not do anything to conceal any bias against Raiford on the basis of her relationship with Aullman.

V. Our Standard of Review

In deciding whether the trial court erred in denying a motion for a new trial, three standards of review are applicable. First, a trial court is vested with broad discretion when deciding the motion. See Whelan v. Memory-Swift Homes, Inc., 315 S.W.2d 593, 594 (Ky. 1958). Second, as a reviewing court, this Court will not reverse the trial court's decision unless we conclude that the trial court has abused its discretion. See id. Third, when an issue warrants factual findings by the trial court in support of its decision, this Court will not disturb those factual findings unless we conclude that they are clearly erroneous. See Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998).

VI. Undisclosed Juror Bias

Guided by the appropriate standards, we turn to the law pertaining to undisclosed juror bias. A person charged with a crime has a constitutional right to a trial by a "fair and impartial jury composed of members who are disinterested and free from bias and prejudice, actual or implied or reasonably inferred." See Tayloe v. Commonwealth, 335 S.W.2d 556, 558 (Ky. 1960). When a person challenges the fairness of the trial on the basis that he or she did not have an impartial jury, the United States Supreme Court has a held that a person must demonstrate both of the following before he or she is entitled to a new trial: (1) that a juror failed to answer honestly a material question on *voir dire*; and (2) that a correct response would have provided a valid basis for a challenge for cause. See McDonough Power Equipment, Inc. v.

Greenwood 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984) (test cited with approval by this Court in Adkins v. Commonwealth, 96 S.W.3d 779, 796 (Ky. 2003)).

In this case, the trial court concluded after hearing Raiford's proof that Raiford did not demonstrate the first element -- that Holland failed to answer honestly a material question on *voir dire*. We will not disturb the trial court's findings in support of this conclusion as they are supported by Holland's testimony and not contradicted by any other evidence. Raiford demonstrated that Holland was mistaken, not dishonest. See McDonough, 464 U.S. at 555 (reasoning that invalidation of the result of a three-week trial because of a juror's mistaken, though honest response to a question, would be "to insist on something closer to perfection than our judicial system can be expected to give").

Raiford argues that the trial court should have presumed juror bias on the part of Holland as a matter of law because she deliberately concealed her prior knowledge of and relationship with Andy Aullman during the trial. In supporting this contention, Raiford relies on the fact that Holland admitted that she recognized Aullman -- not by name, but by appearance -- after he began testifying in the trial. Raiford contends that Holland should have informed the trial court that she knew Aullman once she recognized him.

While Raiford's argument is persuasive to those of us in the legal community, we do not believe that all citizens summoned to serve on a jury would know what to do in Holland's circumstances. In deciding the merits, we return to one of the trial court's key factual findings in this case -- that Holland did not do anything to conceal any bias against Raiford on the basis of her relationship with Aullman.

Even if Holland became aware at a later point in the trial that she knew Aullman and had cashed checks at his Marathon station, the trial court concluded that her failure to advise the court of such a relationship was not done in an effort to conceal any bias. This is a matter left to the trial court's sound discretion. Having reviewed the entirety of the evidentiary hearing and having observed the careful balancing that the trial court undertook in reaching its decision, we do not agree with Raiford that the trial court abused its discretion in this case.

Before we conclude our opinion, we must address the Commonwealth's motion to strike Raiford's reply brief on the basis that it does not comply with the substantial requirements of CR 76.12(4)(c). In its motion, the Commonwealth takes issue with Raiford's accusation in his reply brief that the Commonwealth's counterstatement of the case (in its brief) contained pure speculation and supposition when discussing Holland's reasons for not alerting the trial court once she recognized Aullman.

We deny the motion to strike. As stated above, this Court reviewed the evidentiary hearing on Raiford's motion in its entirety. Having done so, we were able to separate Raiford's impassioned arguments from the facts and procedural history and allow Raiford some latitude in his reply brief.

We affirm the trial court's denial of Raiford's motion for a new trial and judgment of conviction.

All concur.

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