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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

AS MODIFIED: NOVEMBER 5, 2007
AS MODIFIED: NOVEMBER 1, 2007
RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-1-07 ElliA Grovith, D.C.

2005-SC-000106-MR

MICHAEL RAY PENLEY — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HON. THOMAS R. LEWIS, JUDGE
NO. 98-CR-000674

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A jury of the Warren Circuit Court convicted Appellant, Michael Ray Penley, of the intentional murder of Jackie Broner. For this crime, Appellant was sentenced to twenty-five years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we reverse and remand Appellant's conviction.

I. Background

On August 26, 1998, Appellant shot pub patron Jackie Broner. Appellant and his friend, Joe Reed, had been drinking heavily all day. After being turned away by two local pubs, Appellant and Reed were admitted to the Little Brown Jug where they were drinking beer and playing cards when Frank Littrell and Jackie Broner arrived around 10:30 or 11:00 p.m. Soon thereafter, Appellant got into a confrontation with Broner and without explanation or warning, he shot Broner. He would not allow anyone to assist

the wounded Broner. When law enforcement responded to the scene, Appellant was smoking a cigarette in a booth with his beer and gun placed in front of him.

At trial, Appellant claimed that he shot Broner in self defense. His attorney explained that Appellant was suspicious and paranoid due to his long-standing bipolar disorder and that his judgment was impaired that night due to his highly intoxicated state. Appellant was subsequently convicted of intentional murder, and now appeals that conviction.

II. Analysis

Appellant raises several claims of error. Because his claim that he was improperly denied the opportunity to conduct voir dire is grounds for reversal, his four other claims of error (two of which are not preserved) need not be addressed as they are unlikely to be repeated on retrial.

Appellant contends that the trial court's failure to disclose a relationship between a witness and a juror, known to the court before the jury was sworn, violated his right to question the impartiality of the juror in his trial.

At trial, the prosecutor read the list of his witnesses and asked after each name if anyone in the jury pool knew the person. When the name "John Harold" was reached, a male juror stated something inaudible, but to which the prosecutor replied with information that Harold worked at The Little Brown Jug. The male voice then stated that he knew a John Harold who was forty to forty-five years old, and asked if it could be the same person. The prosecutor definitively replied, "No, not the same person."

Jury selection proceeded, with fourteen jurors being selected. Before being sworn, and outside the presence of the attorneys, Juror Wyatt approached the judge and said he thought that the witness John Harold was the man he knew "because the

one I know is out in the hallway." He further told the court that he couldn't "imagine why it would make any difference," and that he and Harold had worked together years ago. He attempted to ask the court if either one of the lawyers would want to know, but the court told him no. The court then did not disclose this information to the attorneys, and it in fact remained unknown until the record was reviewed on appeal.

Harold testified that he was present at The Little Brown Jug the night the decedent was shot and that he heard Appellant say he was going to kill someone. This was clearly prejudicial testimony, particularly if Wyatt was predisposed to believe him.

Wyatt ended up being foreman of the jury that convicted Appellant of intentional murder and sentenced him to twenty-five years in the penitentiary.

The record reveals that the trial court prevented counsel for defendant from developing the extent of Wyatt's relationship with Harold, and whether Wyatt would be inclined to believe Harold over other witnesses because of his opinion of Harold. Had Wyatt answered that he would give more credibility to Harold's testimony because of their relationship, then he would have been struck for cause, not as a peremptory.

The answer to this can not be known because the court did not allow any voir dire on Wyatt's disclosure of his relationship with Harold. All Wyatt said was that he didn't know if that would make any difference, and began to wonder whether the lawyers would want to know. It was actually the court that said, "I don't think it would be a problem."

The Commonwealth cites Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997), as authority for holding the trial court's error to be harmless. In fact, Moss is distinguishable.

Factually, Moss is similar to this case, as both involve a juror having a relationship with a witness. In Moss, one of the police officer witnesses was married to the juror's cousin. The court was informed but did not reveal this to counsel or allow additional voir dire. Moss argued that he might have used a peremptory if he had known of the relationship. This Court found that reasoning too speculative.

When the defendant in Moss focused on peremptories, he made the wrong argument. It is not a question of whether a peremptory strike might have been used, but whether a relationship could have been developed on voir dire that would constitute cause. Clearly, strikes for cause and peremptory strikes are significantly different. Peremptories are at will, provided they do not violate Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). Strikes for cause go to the essence of a fair and impartial trial: if there is cause to believe a juror cannot be unbiased, he or she must be struck. In this case, the Appellant was foreclosed from pursuing whether a relationship existed between the juror and witness sufficient to show cause.

Voir dire, as one of the primary means of selecting a fair jury, is an integral part of the constitutional guarantee of a fair trial. The trial court's error is thus constitutional in nature, and cannot be harmless unless it is beyond a reasonable doubt that it is harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

Further, the original common-law harmless-error rule put the burden on the beneficiary of the error to prove no harm. Id. at 23, 87 S.Ct. at 828. Here, it would be impossible for the Commonwealth to prove that the error was harmless beyond a reasonable doubt, which as the unwitting beneficiary of the error, it is required to do. As

the representative of the state, the Commonwealth has as much interest in ensuring a fair trial as does the defendant. Neither the Commonwealth nor the Appellant could do that given the complete denial of voir dire on the subsequent disclosure to the court.

This Court in Moss actually expresses appropriate concern: "It would have been far better to have advised counsel of the communication and allowed the parties to incorporate this information into their decision making. . . ." 949 S.W.2d at 581 (emphasis added) (referring to peremptories, which require a lesser standard to strike than a motion for cause). If it is "far better" to know of the disclosure in deciding on a peremptory, how much more so for cause?

The Court in Moss heard only the defendant's arguments on peremptories rather than the more compelling question of whether a defendant had been given a fair opportunity to develop a strike for cause. To curtail the Appellant's voir dire in this case amounts to saying that there is no right to voir dire for cause in any case. This is simply not an error that can ever be harmless. Hayes v. Commonwealth, 175 S.W.3d 574 (Ky. 2005); Paenitz v. Commonwealth, 820 S.W.2d 480 (Ky. 1991).

To allow a complete denial of voir dire on information disclosed to the court, but not to the parties, which would prevent a defendant from developing a strike for cause is prejudicial error. The combined errors of the prosecution failing to identify the witness properly and the trial court failing to reveal the witness's identity undermine the integrity and fundamental fairness of the trial, albeit unintended.

Consequently, this case is reversed and remanded for a new trial.

Lambert, C.J.; Cunningham, McAnulty, Noble and Schroder, JJ., concur. Minton and Scott, JJ., both dissent by separate opinions.

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RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

NO. 2005-SC-000106-MR

MICHAEL RAY PENLEY — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
INDICTMENT NO. 98-CR-00674

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE MINTON

I agree with the majority and with the dissent that the trial court clearly erred by failing to disclose his contact with venire member Wyatt to the Commonwealth and defense counsel. But I respectfully dissent from the majority's conclusion that that error entitles Penley to a new trial. On that point, I agree with Justice Scott's dissent. Unlike Justice Scott, however, I believe that Penley is entitled to affirmative relief short of a new trial. Namely, an evidentiary hearing should be conducted on the issue involving juror Wyatt's relationship with witness Harold. As the United States Supreme Court has pointed out, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982). And the Supreme Court "has long held

that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215. So I believe that we should order the Warren Circuit Court to conduct an evidentiary hearing on this matter, at which Penley will have an opportunity to attempt to prove that juror Wyatt was actually biased.

I also disagree with the majority's conclusion that the trial court somehow foreclosed defense counsel from fully developing venire member Wyatt's relationship with the Commonwealth's potential witness, Harold. As Justice Scott cogently points out, the trial court did not foreclose defense counsel from further questioning Wyatt in voir dire about his potential relationship with Harold. Although defense counsel's pursuit of Wyatt's relationship with Harold was understandably deflected by the Commonwealth's quick response to Harold's question, we have clearly held that defense counsel bears the ultimate burden to ask enough questions on voir dire to ensure that all relevant information is disclosed by any member of the venire. Moss v. Commonwealth, 949 S.W.2d 579, 581 (Ky. 1997).

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE SCOTT

Because Appellant has set forth absolutely no proof, suggestion, or even a hunch that Juror Wyatt *may have been* biased or otherwise unqualified, I respectfully dissent. It must be remembered here that Juror Wyatt specifically indicated that he was not biased or partial when he approached the trial judge and stated, "[e]arlier when they asked if I knew John Harold, I think I do because the one I know is out in the hallway. Now, *I can't imagine any reason why it would make any difference* . . . we worked together and I knew him that way from years ago . . . ." (Emphasis added). I further dissent because even under the most generous of standards, Appellant is entitled to no more than an evidentiary hearing at which he would have the opportunity to prove actual bias.

There is no doubt that the trial court erred in this instance. Whenever a jury pool member makes a disclosure of acquaintance with a witness, the trial judge is obligated to inform the parties so that they may "incorporate this

information into their decision-making as to the use of their challenges." Moss v. Commonwealth, 949 S.W.2d 579, 581 (Ky. 1997). The majority mischaracterizes the trial court's error, however, as "foreclose[ing Appellant] from pursuing whether a relationship existed between the juror and witness sufficient to show cause."

No such thing occurred in this case. At no point did the trial court bar Appellant's counsel from questioning juror Wyatt regarding any relationships he might have had with any of the witnesses. The majority's suggestion that an erroneous statement by the prosecutor operated to "foreclose" questioning by Appellant is incorrect since "Appellant himself bears the primary responsibility to ask the proper question on voir dire examination and a failure to so inquire will generally preclude relief." Moss, 949 S.W.2d at 581.

Indeed, in Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982), the U.S. Supreme Court rejected a similar argument, holding that a prosecutor's withholding of information regarding the potential bias of a jury member did not constitute a per se violation of the defendant's due process or fair trial rights.[1] 455 U.S. at 217-220. Rather, in a case where information regarding a jury member is withheld, the U.S. Supreme Court held that a constitutional violation does not materialize *unless the juror is found to be impliedly or actually biased.* Id.

In support of its holding, the U.S. Supreme Court in Phillips, supra, analogized the prosecutor's withholding of information regarding the potential

[1] By erroneously characterizing the error in this case as a per se constitutional violation, the majority obscures its true holding which is the creation of a court-imposed prophylactic rule.

bias of a jury member to the withholding of potentially exculpatory information which could constitute a Brady violation. In determining that the withholding of exculpatory information is not a violation of due process unless the exculpatory information is "material either to guilt or to punishment," the Court "recognized that the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.[2]'" Phillips, 455 U.S. at 219 (quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L.Ed.2d 215 (1963)). Likewise, in this case, society should not be punished for errors made by either the prosecutor or the judge unless it can be shown, or even inferred, that these errors somehow caused Appellant to suffer the inequities of an unfair trial.

"It is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed *if and only if* an unqualified juror participates in the decision of the case." Sanders v. Commonwealth, 801 S.W.2d 665, 669 (Ky. 1990)(emphasis added). Since mere acquaintance alone is not sufficient to make a case for implied or inferred bias, see Moss, 949 S.W.2d at 581; Sholler v. Commonwealth, 969 S.W.2d 706, 709 (Ky. 1998) (implied bias "does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate the probability of partiality"); Sanders v. Commonwealth, 801 S.W.2d 665, 669 (Ky. 1990) (no actual or implied bias where a juror worked with the wife of one of the victims), *actual bias* is the only

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[2] The Phillips Court also cited to the 1976 case of United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342, which the Court notes is "[c]onsistent with Brady, [in that] we focused not upon the prosecutor's failure to disclose, but upon the effect of nondisclosure on the trial." Phillips, 455 U.S. at 219-220.

premise on which Appellant could *possibly* base a finding that juror Wyatt was somehow unqualified to serve in this case.

The majority erroneously holds that it is the Commonwealth's burden to prove that juror Wyatt was not biased. Yet, the majority's premise is unsupported by reason or law since "[b]ias or prejudice of a juror is not presumed; actually, the converse is true unless there is some basis to the contrary in the record." Whisman v. Commonwealth, 667 S.W.2d 394, 398 (Ky. App. 1984); See Polk v. Commonwealth, 574 S.W.2d 335, 336 (Ky. App. 1978)("It is incumbent upon the party claiming bias or partiality to prove the point."); Watson v. Commonwealth, 433 S.W.2d 884 (Ky. 1968) (holding that the existence of jury bias is a matter of fact and is not to be presumed). Cf. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984) (in cases were juror fails to answer honestly on voir dire, a litigant is entitled to a new trial only if he can show "that a correct response would have provided a valid basis for a challenge for cause"); accord Adkins v. Commonwealth, 96 S.W.3d 779, 796 (Ky. 2003), Brown v. Commonwealth, 174 S.W.3d 421, 430 (Ky. 2005).

When the circumstances are reviewed in their totality, there is nothing to indicate that the trial court's error denied Appellant his right to a fair and impartial jury, or that jury foreman Wyatt was in anyway unqualified to serve as a juror in this case. Accordingly, in the absence of any proof or inclination to the contrary, the trial court's error cannot be anything but harmless. See Hilliard v. Commonwealth, 158 S.W.3d 758, 764 (Ky. 2005) (no reversible error when it was revealed after trial that a juror was the ex-brother-in-law of a defense witness where: (1) the juror did not deliberately withhold any information during

voir dire; and (2) Appellant failed to set forth any evidence that his failure to acquire the above information was prejudicial); Key v. Commonwealth, 840 S.W.2d 827, 830 (Ky. App. 1992) (no proof of juror bias when defendant failed to elicit testimony from juror in question and only evidence offered showed nothing more than speculation that juror was biased).

In any event, even if one accepts that Appellant did allege a colorable argument regarding juror Wyatt's impartiality, it has long been held "that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Phillips, 455 U.S. at 215 (rejecting a lower court's granting of a new trial in a case where the prosecutor withheld information regarding the potential bias of a juror); Hilliard, 158 S.W.3d at 764 (referencing the holding of a post-trial evidentiary hearing regarding the potential bias of a juror). Accordingly, even if Appellant were entitled to relief, he is not entitled to a new trial, but rather an evidentiary hearing to prove his allegations.

For these reasons, I must respectfully dissent.

Supreme Court of Kentucky

2005-SC-000106-MR

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COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER OF CORRECTION

The Order Denying Petition for Rehearing and Modifying Memorandum Opinion of the Court entered November 1, 2007, is hereby corrected on its face by substitution of the attached pages 1 and 6, in lieu of pages 1 and 6 attached to the original order. By the substitution of page 6, the vote of the Court to the original Memorandum Opinion rendered April 19, 2007 is set forth. Said modification does not affect the holding.

ENTERED: November 5, 2007.

CHIEF JUSTICE