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RENDERED: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000645-MR

HENRY J. CRAWFORD — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 07-CR-000418

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In 1990, Dana Minrath was the victim of a home invasion, a violent physical attack, and a brutal sexual assault. Upon returning home from dropping off her daughter at daycare, Minrath was attacked by an assailant who had been hiding in the home. From behind, he dealt a severe blow to her head and then forced her to the floor. He further subdued her by pressing a gun to the back of her head. He then dragged her to the bedroom and shoved her to the bed, face down. The assailant bound her hands and legs, blindfolded her with a scarf, and removed all of her clothing. He then anally sodomized and raped Minrath.

Eventually, Minrath's attacker left the room and she could hear him rummaging through the house. A few minutes later, she heard the kitchen door open and close. Once she was satisfied that he had left, Minrath began a long struggle to free herself, but was only successful in removing the bindings

from her legs. Still unclothed and bleeding heavily from the head wound, she ran to the neighbor's home. Getting no response, she then managed to draw the attention of a passing truck. By that time, the elderly neighbor had also come to the door.

The driver of the truck covered Minrath with a blanket and assisted her into the neighbor's home. Minrath was taken by ambulance to the hospital where she received twelve stitches for injuries to her head. The physical examination of Minrath included the collection of sexual assault evidence. She was able to provide a description of her assailant to police, although she acknowledged that she only got one glimpse of him before he forced her to the floor and blindfolded her. Later, it was also discovered that a handgun and ring were missing from the home.

The crimes went unsolved for many years. In 2006, Appellant, Henry Crawford was incarcerated and his DNA profile was entered into the Combined DNA Index System (CODIS). Appellant's DNA matched the DNA profile of the swabs taken in Minrath's sexual assault kit. This match restarted the dormant investigation. In addition to the DNA evidence, the investigation also revealed that Appellant had been seen in the neighborhood at the same time the crimes were committed.

DNA was obtained from the blanket Minrath used to cover herself while she waited at her neighbor's home for the police to arrive. These samples were frozen in 1990 and retested in 2006. DNA obtained from the blanket which

had been wrapped around the naked victim was tested and proved to be a mixture of Minrath's DNA and Appellant's DNA.

Appellant was arrested and tried on charges of burglary in the first degree, robbery in the first degree, rape in the first degree, sodomy in the first degree, and for being a persistent felony offender in the first degree. He was convicted on all counts and sentenced to an aggregate sentence of imprisonment for 200 years. He now appeals that conviction as a matter of right, raising five issues for review.

Sexual Assault Kit Evidence

Appellant first argues that the Commonwealth's failure to turn over the sexual assault kit collected in this case denied him due process of law. As explained below, though a discovery violation occurred, reversal is not required.

Through repeated discovery motions, defense counsel requested evidence obtained from both the sexual assault kit and the blanket. While the evidence obtained from the blanket was ultimately provided to the defense, it is undisputed that the Commonwealth failed to release the evidence requested from the sexual assault kit. This included the listing of the genetic profile obtained from the sexual assault kit, as well as the electronic version of this data.

Prior to the presentation of evidence, defense counsel filed a motion "to exclude any DNA evidence/results related to the vaginal or anal swabs of Dana Minrath." At a subsequent hearing on the motion, the Commonwealth

informed the court that it did not intend to enter any of the evidence or results relating to the vaginal or anal swabs. Accordingly, the motion was granted without objection and the evidence was excluded. It is significant to note that upon the court's ruling, Appellant did not request a continuance for testing.

Because Appellant was granted the harshest remedy available under RCr 7.24 – total exclusion of the evidence – we do not find that reversal is warranted solely due to the discovery violation. However, Appellant further argues that his due process rights were violated by the Commonwealth's failure to release the requested evidence for independent defense testing. He claims that, without the electronic data, it could not be independently confirmed that the profile was entered into the CODIS database correctly or that he was a match. Indeed, the right to independent testing is implicit under RCr 7.24. *McGregor v. Hines*, 995 S.W.2d 384, 387 (Ky. 1999). Moreover, "a defendant's right to test possible exculpatory evidence is as fundamental to the assurance of due process as is his right to test inculpatory evidence, if not more so." *Id.*

Appellant relies on *Brady v. Maryland*, 373 U.S. 83 (1963) to argue that his due process rights were so infringed upon as to require reversal. In *Brady*, it was held that the suppression by the prosecution of exculpatory or favorable evidence violates the defendant's due process rights. *Id.* at 87. However, in order for a violation of *Brady* to be found, it must be established that the evidence was exculpatory or impeaching, that the evidence was suppressed by the prosecution, and that prejudice resulted. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). To satisfy the third prong of this analysis, the accused must

show that there is a reasonable probability that the conviction or sentence would have been different had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

While the Commonwealth concedes that the evidence was not disclosed, Appellant has failed to satisfy either of the remaining prongs of the *Strickler* analysis. It is purely speculation to claim that the DNA samples taken from the sexual assault kit indicating a match between Appellant's DNA, and the vaginal swab taken from Minrath, held any potentially exculpatory value. More importantly, however, Appellant cannot satisfy the requirement that a reasonable probability exists that the conviction would have been different had Appellant been afforded the opportunity to test the evidence.

DNA evidence from the blanket used to wrap Minrath was properly admitted. Samples from the blanket revealed a mixture of Minrath's DNA and Appellant's DNA. This evidence was extremely damning, particularly in the absence of any claim that the sexual intercourse between Minrath and Appellant was consensual. Even if the CODIS match had been challenged by the results of independent testing, the further testing of the blanket evidence removed any *reasonable* probability that Appellant would have been acquitted.

We fail to perceive how Appellant was materially prejudiced by the Commonwealth's failure to disclose this evidence, particularly because it was never introduced at trial. Reversal is not required. Nonetheless, we again emphasize that discovery is not "a cat and mouse game whereby the

Commonwealth is permitted to withhold important information requested by the accused." *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972).

As a related matter, Appellant argues that the trial court erroneously denied his request to question forensic scientist Marci Adkins on avowal concerning her analysis of the sexual assault kit evidence. We find no error in this ruling. Appellant moved to have the evidence excluded and was afforded this remedy. He was, therefore, not entitled to question the witness concerning evidence which was excluded at his request.

Jury Selection

Appellant argues that the trial court erred in refusing to strike Juror 156287 for cause. The argument is properly preserved for review by defense counsel's objection. Further, Appellant exercised a peremptory challenge to remove Juror 156287 and exhausted all other peremptory challenges, as required by *Shane v. Commonwealth*, 243 S.W.3d 336, 340 (Ky. 2007).

During general voir dire, Juror 156287 approached the bench and indicated that he was a neighbor of Lieutenant Tracy Shuggart, a witness for the Commonwealth. The juror further revealed that he was an administrative law judge and that his wife was an attorney. Defense counsel then stated that he could "clear this up real quick," and asked the juror if "the fact that Lt. Shuggart is your neighbor would affect your ability to judge and weigh the facts." The juror responded: "I don't know. I know her, but I don't know anyone else." Neither party asked any further questions. In denying defense counsel's later motion to strike, the trial court noted that the juror expressed

some hesitancy, but never made an affirmative statement that his relationship with the witness would affect his ability to be fair and impartial.

The trial court's decision as to whether to strike a juror for cause is reviewed for an abuse of discretion. *Adkins v. Commonwealth*, 96 S.W.3d 779, 795 (Ky. 2003). RCr 9.36(1) requires that a juror be excused for cause if there is a reasonable basis that he cannot be fair and impartial. As the party seeking removal of the juror, Appellant bore the burden of demonstrating the juror's bias or other reason for disqualification. Here, defense counsel asked a single question of the juror and made no further attempt to develop a potential bias.

Looking at the totality of the circumstances, we find no error in the trial court's ruling. *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991). The juror made no affirmative statement that he could not be impartial in light of his acquaintance with Lt. Shuggart; nor did defense counsel attempt to develop the exact nature of the relationship between the witness and the juror. The mere fact that they were neighbors is insufficient to establish an implied bias. *See Derossett v. Commonwealth*, 867 S.W.2d 195, 197 (Ky. 1993) ("Acquaintance with a *victim's* family or residing in the same general neighborhood is not a relationship sufficient to always disqualify a prospective juror.") (Emphasis added). The juror's brief statements, standing alone, were insufficient to warrant disqualification. The trial court did not abuse its discretion in light of the very limited information elicited from the juror.

Disclosure of Commonwealth's Witness

Appellant claims a second discovery violation where the Commonwealth failed to disclose Lieutenant Danny Asef as a witness. Lt. Asef was a career police officer in Louisville who was on duty in the area of Minrath's home when these crimes occurred. When the Commonwealth attempted to ask Lt. Asef if he recalled seeing Appellant in the neighborhood when the crimes occurred, defense counsel objected.

At the bench, defense counsel argued that he had not been informed that Lt. Asef would be called as a witness. He further explained that, through an email contained in discovery, he was aware that the Commonwealth was attempting to connect Appellant to Minrath's home through a known drug dealer living on the same street. On this basis, defense counsel asserted both that the testimony would be inadmissible KRE 404(b) evidence, and that it would be unduly prejudicial. The Commonwealth responded that it intended to ask Lt. Asef only if he had seen Appellant in the area at the time of the crimes and would not ask any details concerning unrelated drug activity. The trial court then overruled the objection and Lt. Asef gave no testimony referencing drug activity in the area of Minrath's home.

We find no error in the trial court's ruling. A party is not required under RCr 7.24 to produce a list of potential witnesses to the opposing party. *Lowe v. Commonwealth*, 712 S.W.2d 944, 945 (Ky. 1986). Nor did Lt. Asef's testimony contain information that the Commonwealth is required to disclose pursuant to RCr 7.24. Likewise, we find Appellant's brief reference to *Brady v. Maryland*

unavailing, as he advances no argument that Lt. Asef possessed exculpatory or favorable information. There was no error.

Sentencing

As a final assignment of error, Appellant claims that the trial court erred in refusing to apply the statutory penalty cap contained in KRS 532.110(1)(c). The crimes in this case occurred in 1990, though not tried until 2010. Prior to trial, defense counsel moved for the trial court to apply the sentencing law in effect in 1990, including the 1990 violent offender statute. It is evident that this request was made to take advantage of more lenient parole and life sentence calculations effective in 1990. The trial court granted this motion.

After his conviction, defense counsel moved to have the jury's recommended sentence of 200 years reduced to 70 years, pursuant to KRS 532.110(1)(c). The current 70-year sentencing cap contained in KRS 532.110(1)(c) was enacted in 1998. The trial court noted that defense counsel had successfully moved, prior to trial, to proceed under 1990 law. The order granting that motion specifically applied to "any and all future proceedings." The trial court concluded that Appellant could not reverse that election and denied the motion to apply the statutory sentencing cap.

KRS 446.110 permits a defendant to take advantage of a subsequent change in the law as to punishment: "If . . . any punishment is mitigated by any provision of the new law, such provision may, by consent of the party affected, be applied to any judgment pronounced after the new law takes effect." We need not specifically determine whether the 1998 provision

mitigates Appellant's potential sentence because it caps the total possible aggregate sentence at 70 years. Instead, Appellant's claim can be rejected because he did not expressly consent to application of the more recent law. *See Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000) (requiring "unqualified consent" of the defendant to retroactive application of law). In fact, he specifically requested application of the 1990 law. Furthermore, Appellant's ultimate request to retroactively apply the 1998 version of KRS 532.110(1)(c), made after conviction, was untimely. *See Meece v. Commonwealth*, 348 S.W.3d 627, 724 (Ky. 2011) (KRS 446.110 request for retroactive application must be made prior to empanelling of the jury). The trial court properly denied Appellant's motion.

Conclusion

For the foregoing reasons, the judgment of the Jefferson Circuit Court is hereby affirmed.

Minton, C.J.; Abramson, Cunningham, Schroder, Scott and Venters, JJ., concur. Noble, J., concurs in result only.

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