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RENDERED: JULY 9, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000309-MR

JUSTIN BOWLIN — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN LAPE, JUDGE
NO. 17-CR-00172

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the early morning hours of January 12, 2017, Justin Bowlin embarked on a course of illegal conduct culminating in his arrest and eventual conviction for robbery in the first degree, receiving stolen property over $500, and being a persistent felony offender in the first degree.[1] He received an aggregate sentence of thirty-five years' imprisonment. He now appeals his conviction and sentence as a matter of right. Following a careful review, and discerning no error, we affirm.

Well after midnight on January 12, 2017, Bowlin went to a sober living house to trade stolen items for illegal drugs. After leaving the house where he

[1] A charge of assault in the first degree was dismissed before trial.

was injected with methamphetamine,[2] Bowlin found a white Mitsubishi with its engine running. He took the Mitsubishi and drove to Cincinnati to "lay low." He returned to Kentucky some time later, and after missing his exit to go to Kroger, stopped at a nearby Fastenal store where he broke in and stole several tools. He then went to a friend's house and traded one of the stolen tools for a Sony PlayStation gaming console. Becoming increasingly paranoid, Bowlin left in the stolen Mitsubishi and drove erratically. Shortly thereafter, he lost control of the vehicle, flipping it several times and crashed it into a telephone pole.

At approximately 6:15 a.m., Courtney White was on her way to take her daughter to daycare then on to work when she came across the wreckage. Bowlin approached her and asked to use her phone. Before she could respond, Bowlin entered the passenger side of her vehicle, told her he had a gun, ordered her to start driving, and offered to pay her $100.00 for a ride. During the drive, Bowlin punched White in the head multiple times until she was able to get out of the car. Before fleeing in the car, Bowlin allowed White to get her two-year-old out of the rear seat but ran over White's foot in his haste to get away. He subsequently travelled to an ex-girlfriend's home where he dumped most of White's possessions from the car in the yard or a trash can.

[2] Bowlin would later indicate he was unsure what substance he ingested, but he believed it was methamphetamine which had been adulterated in some way based on its effects compared to his "normal" methamphetamine injections.

Kentucky State Police Trooper Joseph Brown observed Bowlin on I-71 travelling approximately 90 miles per hour in White's car. Trooper Brown activated his emergency equipment and Bowlin sped away. A ten- to eleven-mile chase ensued, at speeds ranging from 85 to 105 miles per hour, before Bowlin crashed the car into a ditch. After a short foot pursuit, Trooper Brown was able to deploy his Taser to immobilize Bowlin and place him under arrest. He was transported to the Kentucky State Police Post 5. Several hours later, at approximately noon, Detective Mark Fielding[3] of the Independence Police Department arrived and conducted a three-and-a-half-hour videotaped interview with Bowlin. He was subsequently indicted on the aforementioned charges.

A four-day jury trial was convened during which the Commonwealth produced eleven witnesses and eighty-seven exhibits. Bowlin called four witnesses, introduced thirteen exhibits, and testified on his own behalf. After deliberating forty-five minutes, the jury returned guilty verdicts on all counts. Following the penalty phase, the jury deliberated just over one hour before recommending a total sentence of thirty-five years' imprisonment. On April 11, 2019, the trial court sentenced Bowlin in accordance with the jury's recommendation, and this appeal followed.

[3] Before the case went to trial, Detective Fielding retired from the Independence Police Department. At the time of trial, he was working as a School Resource Officer.

Bowlin presents three allegations of error in seeking reversal of his convictions. First, he challenges the trial court's denial of his motions to strike four jurors for cause. Next, he contends the trial court's refusal to play the entirety of his three-and-a-half-hour interview with police constituted reversible error. Finally, Bowlin asserts the trial court erred in limiting the testimony of his retained expert witness, Dr. E. Don Nelson.

Bowlin first contends he was denied his constitutional right to a fair and impartial jury because of the trial court's denial of his motions to strike four jurors for cause. He alleges three of the jurors were unable to consider intoxication as a defense and the fourth stated she would tend to believe police officers over other witnesses. "Whether to exclude a juror for cause lies within the sound discretion of the trial court, and on appellate review, we will not reverse the trial court's determination 'unless the action of the trial court is an abuse of discretion or is clearly erroneous.'" *Hammond v. Commonwealth*, 504 S.W.3d 44, 54 (Ky. 2016) (*quoting Ordway v. Commonwealth,* 391 S.W.3d 762, 780 (Ky. 2013)). In determining whether to exclude a juror, trial courts are required to follow the mandates of RCr[4] 9.36(1) which states in pertinent part, "[w]hen 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." "Rule 9.36(1) is the only standard for determining whether a juror should be stricken for cause. A clearer, more concise expression would

[4] Kentucky Rules of Criminal Procedure.

be difficult to conceive." *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 193 (Ky. 2017). A trial court should base its decision "on the totality of the circumstances, not on a response to any one question." *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). The burden of proving bias and resulting prejudice remains wholly on the party alleging same. *Cook v. Commonwealth*, 129 S.W.3d 351, 357 (Ky. 2004). "[A] trial court's erroneous failure to excuse a juror for cause necessitating the use of a peremptory strike is reversible error." *Little v. Commonwealth*, 422 S.W.3d 238, 241 (Ky. 2013) (citing *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007)).

During voir dire, defense counsel inquired of the venire whether they could consider voluntary intoxication as a potential defense to the intent element of the charge of robbery in the first degree. The discussion primarily centered on intoxication by alcohol rather than illicit drugs. In response, Juror 96 responded no one put a gun to Bowlin's head and made him drink. He indicated his belief he would still find Bowlin guilty of an intentional act, even if shown Bowlin was intoxicated at the time of the offense. Juror 92 stated Bowlin's choice to drink or do drugs before breaking the law would still make him guilty. Juror 101 agreed with Juror 92's statements. The trial court specifically addressed these three jurors, explaining it would be instructing them on the law regarding intoxication. All of the jurors agreed they could and would follow the law as given, even if they did not like it. Additional questioning ensued on the subject and Juror 101 was called to the bench for individual examination. After hearing the responses and Bowlin's repeated

arguments regarding striking these three potential jurors for cause, the trial court denied the motions.

Defense counsel then inquired of the venire if they could consider illegal drug use for decreased culpability to an intentional act and all indicated they could. He asked if they could follow the law on voluntary intoxication as a defense if stimulants were the intoxicant. Again, all potential jurors indicated they could and would follow the law as instructed.

Defense counsel asked the panel if they believed a police officer would be more likely than another witness to tell the truth simply because of their occupation. Juror 168 indicated her hope that was true because a police officer's job was to tell the truth about situations they encounter. Upon additional questioning by defense counsel, Juror 168 stated she would remain open-minded and not lean toward the prosecution simply because a police officer testified. Bowlin's motion to exclude Juror 168 was denied. Ultimately, Bowlin used peremptory strikes to remove Jurors 92, 96, 101, and 168.[5]

Bowlin now contends the trial court erred in failing to strike these jurors and urges reversal. We disagree. Although Jurors 92, 96, and 101 initially indicated they would have difficulty applying the law contrary to their beliefs,

[5] Bowlin complied with the rule established in *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009), preserving the alleged errors denying his challenges for cause. "[I]n order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." *See also Floyd v. Neal*, 590 S.W.3d 245, 250 (Ky. 2019). Bowlin identified on the jury strike form five jurors he would have peremptorily struck had he not been compelled to use peremptory strikes to remove Jurors 92, 96, 101, and 168.

subsequent questioning and explanation specific to the defense at bar—rather than nebulous generalities—revealed each could set aside their conflicting beliefs and follow the law. Additionally, Juror 168 indicated no overt bias, instead stating she would remain open and follow the law in reaching her verdict.

The issue before the trial court was not whether Jurors 92, 96, 101, and 168 were actually able to render fair and impartial verdicts. The test demanded by RCr 9.36 is whether, given their initial responses, subsequent verification they could set aside any possible bias and follow the law as instructed, and all other information gleaned from the inquiries bearing on their ability to serve, there was "reasonable ground to believe" they could not. *See Sturgeon*, 521 S.W.3d at 194. As previously stated, this determination must be made based on the totality of the circumstances. "A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination." *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). Our review of the voir dire responses of these four jurors, taken in their entirety, reveals no reason to doubt their qualifications and no indication the trial court applied an incorrect standard. Thus, we are unable to conclude the trial court abused its discretion or clearly erred in denying Bowlin's motions to strike.

Next, Bowlin argues the trial court erred in denying his motions to play his entire videotaped interview with police following his arrest. He claims the trial court's decision to permit him to play only two clips, one being fifteen

minutes long and the other lasting thirteen seconds, "crippled the defense" and denied him the right to present a defense. Bowlin contends the jury needed to see the entire recording to see his behavior to determine his level of intoxication following his arrest. He further asserts his inability to remember much of the interview necessitated playing it for the jury. We disagree.

Trial courts have substantial discretion in decisions on the admission of evidence. We will not disturb such decisions absent a showing of an abuse of that discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005). An abuse of discretion occurs when the trial court acts in an arbitrary, unreasonable, or unfair manner or when the decision is unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Bowlin wished to play his entire interview, arguing it was admissible under the state-of-mind exception to the hearsay rule and KRE[6] 801A(a)(1) as a prior inconsistent statement because he was unable to remember the vast majority of what occurred during the questioning. He wished to play the video so the jury could assess his level of intoxication at the time he committed the crimes. In ruling on his motions, the trial court noted the interview began approximately five hours after Bowlin was arrested, which was several hours after he stated he was injected with the intoxicating substance and began his criminal activities. The trial court indicated playing the first fifteen minutes—the closest point in time to the alleged crimes—should be sufficient to show

[6] Kentucky Rules of Evidence.

Bowlin's level of intoxication and stated playing more would be "overkill." It also permitted Bowlin to play a thirteen second clip from near the end of the interview where Bowlin appeared to fall asleep.

Bowlin claims the trial court's ruling denied the jury the ability to see "the whole picture" of what happened. Notably however, Bowlin does not argue the failure to play the entire videotaped statement violated KRE 106, known as the "rule of completeness," and explicitly claims such an error did not occur, nor could he as the Commonwealth did not attempt to introduce the recording or any portions thereof. Although he vehemently argues the failure to play the entire interview deprived him of his right to present a defense, Bowlin offers no indication of how he was prejudiced by the ruling apart from bald assertions of harm and constitutional violations. We are unable to conclude the trial court abused its discretion in limiting playing the video to the portions noted. Indeed, as mentioned by the Commonwealth, Bowlin was likely not entitled to introduce the video at all, and only by grace of the trial court was he permitted to play the two clips. "His statements made during the interrogation were inadmissible hearsay—admissible [if] offered by the Commonwealth as admissions of a party opponent, KRE 801A(b), but inadmissible [if] offered by himself." *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 331 (Ky. 2006) (citation omitted).[7]

[7] While this statement in *Schrimsher* was made in the context of a KRE 106 challenge, it is nevertheless applicable in this situation as an accurate reflection of the applicability of KRE 801A(b) to police interviews with criminal suspects.

Likewise, we are unconvinced by Bowlin's claim his alleged lack of memory of statements he made during the interview warranted admission under KRE 801A(a)(1) as a prior inconsistent statement. We are mindful of the holding in *Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997), that a statement can be considered inconsistent when a party "claims to be unable to remember it." However, in *Wiley v. Commonwealth*, 348 S.W.3d 570, 578 (Ky. 2010), we explained the relevant inquiry was whether an appearance of hostility was "the driving force behind a witness's claim that he is unable to remember the statement." Absent "a purposeful attempt to frustrate the search for the truth[,]" a claimed inability to recall a prior statement will not warrant a finding of an inconsistent statement under KRE 801A(a)(1). *Id.* at 578-79. There being no allegation of such an attempt at frustrating the search for truth by Bowlin in this case, the hearsay exception of KRE 801A(a)(1) is inapplicable. There was no error in the trial court's ruling.

Finally, Bowlin contends the trial court erred in limiting the testimony of his expert witness, Dr. E. Don Nelson, to exclude any references to Bowlin's actions and behavior during the videotaped interview. Again, he asserts he was deprived of the right to present a complete defense because the testimony was necessary to show his ingestion of methamphetamine was sufficient to mitigate his criminal responsibility. We disagree.

We review rulings on "admissibility of expert testimony for an abuse of discretion unless the challenge is to the trial court's findings of fact regarding the *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct.

2786, 125 L.Ed.2d 469 (1993)] factors, which we review for clear error." *Garrett v. Commonwealth*, 534 S.W.3d 217, 221 (Ky. 2017) (citing *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004)). Because Bowlin challenges the trial court's factual determination regarding Dr. Nelson's qualifications to provide testimony on the effects on Bowlin of a possible stimulant overdose or his level of intoxication at the time of the commission of the offenses, we review for clear error.

Dr. Nelson was qualified as an expert witness in toxicology and pharmacology following a *Daubert* hearing. While the trial court permitted Dr. Nelson to testify about the pharmacological effects of drugs on a human body, because he was not a medical doctor, the trial court would not permit Dr. Nelson to testify regarding the effects of a stimulant overdose on Bowlin nor whether Bowlin was intoxicated at the time of commission of the charged offenses as he was not qualified to do so. Dr. Nelson's opinions in this matter were admittedly based on his review of the videotaped interview of Bowlin, the Uniform Citation, the KYIBRS[8] Narrative Report, and photographs taken of Bowlin following his arrest. No medical examination or chemical analyses were performed for him to review. Thus, any opinion Dr. Nelson could have given regarding Bowlin's intoxication or the effects the substances he claimed to have been given would have been based solely on Bowlin's own self-serving statements.

[8] Kentucky Incident Based Reporting System.

Bowlin was not denied the right to present evidence in his defense by the trial court's ruling. Through his own testimony and that of other witnesses, Bowlin was able to develop his defense that due to his drug use and subsequent intoxication he did not have the capacity to form the requisite intent to commit the charged crimes. He testified to receiving an injection of what he believed was adulterated methamphetamine immediately prior to committing the offenses as well as the effects of the drugs on his memory and mental state. He presented the testimony of Officer Fielding—the then-detective who interviewed Bowlin—who was questioned about his observations of Bowlin following his arrest and indicated his belief Bowlin appeared to be intoxicated. Courtney White, one of Bowlin's victims testified he was acting "fidgety, like he wasn't himself" and was "anxious." Dr. Nelson testified regarding the effects of illicit drugs on the human body. Thus, Bowlin was permitted to present his defense, perhaps just not in the way he would have preferred. The jury was fully aware of his defense of intoxication, spotty memory of the events, and his alleged lack of control over his actions.

We are of the opinion Dr. Nelson's proposed testimony would have been of limited value to the jury as he neither performed nor reviewed any medical tests or analyses and no witnesses testified regarding the amount of methamphetamine Bowlin injected prior to commencing his crime spree. Dr. Nelson's testimony could not have helped the jury understand the evidence nor assisted them in determining whether Bowlin was, in fact, so manifestly under

the influence of methamphetamine to mitigate his criminal responsibility. Therefore, we discern no clear error in the trial court's ruling.

For the foregoing reasons, the judgment and sentence of the Kenton Circuit Court is AFFIRMED.

Minton, C.J.; Hughes, Lambert, Nickell, VanMeter, and Wright, JJ., sitting. Minton, C.J.; Hughes, Nickell, and VanMeter, JJ., concur. Lambert, J., concurs in part and dissents in part by separate opinion in which Wright, J., joins. Keller, J., not sitting.

LAMBERT, J., CONCURRING IN PART AND DISSENTING IN PART: While I concur with much of the majority opinion, I dissent in part as to the failure of the trial court to strike Juror 101 for cause. As reflected in the partial transcript of the voir dire provided by Bowlin in his brief, Juror 101 answered that he could not consider intoxication as a defense to robbery FIVE times. To rehabilitate Juror 101, the Commonwealth asked him questions which illustrated an intoxicated person falling and accidentally knocking someone down (Juror 101 could find that person not guilty of assault), and, someone being so intoxicated that they erroneously pick up the wrong coat (Juror 101 could find that person not guilty of theft).

The right to a jury trial includes the right that the panel include only impartial and indifferent jurors. *Irvin v. Dowd,* 366 U.S. 717 (1961). Because this court has held that a "magic question" can't be used to rehabilitate a juror who has already expressed a disqualifying attitude in *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991), it is my opinion that the trial court

erred in failing to strike Juror 101 for cause, requiring Bowlin to use a preemptory to strike him. In *Montgomery,* our court said:

> The message from this decision to the trial court is the "magic question" does not provide a device to "rehabilitate" a juror who should be considered disqualified by his personal knowledge or his past experience, or **his attitude as expressed on voir dire**.[9]

As intoxication is a mitigation factor in determining guilt, Juror 101's unequivocal responses reflected a settled aversion to considering intoxication as a mitigating factor in any criminal case other than those included in the "magic questions" describing only misdemeanors involving an accidental assault or mistaken theft of a coat. Thus, I must dissent, in part.

Wright, J., joins.

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[9] *Id.* at 718 (emphasis added).