RENDERED: OCTOBER 26, 2023
TO BE PUBLISHED

Supreme Court of Kentucky

2022-SC-0155-MR

LARRY MOULDER APPELLANT

V.

ON APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN T. ALEXANDER, JUDGE
NO. 19-CR-00375

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE CONLEY

REVERSING & REMANDING

This case comes before the Court on appeal as a matter of right[1] by Larry Moulder, the Appellant, from the judgment and sentence of the Barren Circuit Court. Moulder was convicted by a jury of rape in the first-degree, victim under twelve; sodomy in the first-degree, victim under twelve; sexual abuse in the first-degree, victim under twelve; and incest. He was sentenced to life in prison. Moulder's arguments can be summarized broadly as first, Juror A.R. should have been struck for cause; and second, several errors regarding the testimony of the victim, K.R.[2] We conclude that Juror A.R. should have been struck for

[1] Ky. Const. § 110(2)(b).
[2] We use initials to protect the identity of the victim.

cause and reverse. For that reason, we decline to discuss the other alleged errors.[3]

I. Standard of Review and Controlling Law

In *Floyd v. Neal*, we declared the six prerequisites necessary to properly preserve an error regarding the failure to strike a juror for cause. 590 S.W.3d 245, 252 (Ky. 2019). Upon review, Moulder properly preserved this issue and the Commonwealth has not argued otherwise. "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." RCr[4] 9.36(1). RCr 9.36(1) "is the only standard for determining whether a juror should be stricken for cause." *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 193 (Ky. 2017).

> [R]egardless of the juror's *actual* ability to render a fair and impartial verdict, Rule 9.36(1) mandates the removal of a juror if there is merely 'a reasonable ground to believe' that he cannot render a fair and impartial verdict. The difference is palpable. Just as 'probable cause' or 'reasonable grounds' to support an arrest does not require an actual belief in the verity of the charge, 'a reasonable ground to believe' a prospective juror cannot be fair and impartial is not tantamount to an actual finding that the juror cannot be fair and impartial.

Id. at 194. When there is uncertainty about the impartiality of a juror, that juror should be stricken. *Id.* If the questions regarding a juror's impartiality cannot be resolved "with certainty," that juror must be stricken. *Id.* (quoting *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013)). In short, "if a

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[3] Because our decision rests upon the failure to strike Juror A.R. for cause, we omit any discussion of the underlying facts and proceed to an analysis.

[4] Kentucky Rules of Criminal Procedure.

juror falls in a gray area, he should be stricken." *Wallace v. Commonwealth*, 478 S.W.3d 291, 298 (Ky. 2015). "The trial court's ultimate belief that a challenged juror 'can conform his views to the requirements of the law and render a fair and impartial verdict' does not necessarily dispel a 'reasonable ground to believe' otherwise, and thus does not satisfy the requirement of RCr 9.36(1)." *Sturgeon,* 521 S.W.3d at 194. We review a trial court's decision to strike or not strike a juror for cause under an abuse of discretion standard. *Id.* at 192-93.

II. Analysis

During voir dire below, the Commonwealth asked the entire venire if anyone was uncomfortable with pornography. Juror A.R. made some kind of physical indication and the trial court had her come before the bench, flanked by counsel for both the Commonwealth and the defense. At this point, an approximately ten-minute colloquy occurred that we quote at length. At the bench, Juror A.R. stated,

> I have no history, I just feel very uncomfortable about . . . about it all, and I don't know if that . . . I understand its our duty as a citizen and I want to do that, but I just don't know so . . . I don't know if that's a normal feeling or if I cannot give you . . . or be a good juror.

The trial court assuaged her that her feelings of discomfort were not unusual or inappropriate given the subject matter of the case. The following exchange occurred:

> Trial court: I think the question is, does the nature of what we'll be talking about, is that going to prejudice you just because you're uncomfortable or are you going to be able to still weigh, sift

> through the evidence, and weigh it, set aside the fact that you don't like what it is, that were discussing, but still just making a decision based on whether you think it actually happened or not; not just be predisposed to think 'well, it must have happened because that's why we're talking about it.'
>
> Juror A.R.: Um, I don't know that I can answer that. I mean, that's not something that I have experience with or . . .
>
> TC: Right.
>
> A.R.: But so, I don't know, but I want to be a good juror and I want to do what is correct, but I don't know.
>
> TC: Well, let me ask you this . . . [prefatory remarks omitted] If you are a juror, you're going to get, you're going to get an oath, you're going to swear an oath, and that oath is going to require you to be fair and to listen to the evidence, and apply the law to the evidence, and render a fair verdict. Alright? So, do you believe that if you take that oath, you'll be able to fulfill it?
>
> A.R.: I believe so? I will . . . yes.
>
> TC: What, what do you think will keep you from fulfilling it?
>
> A.R.: I think just uh, I just think that it's a child that there's . . . these . . . maybe I am almost thinking . . . .

At this point defense counsel interjected to remind Juror A.R. that there is no right or wrong answer, that she was not "in the principal's office," and that the only right answer is an honest answer. The colloquy continued between defense counsel and Juror A.R., to wit:

> Counsel: But I also feel that you had a strong reaction. Will it be hard to sit on a jury for . . .
>
> A.R.: A child.
>
> Counsel: For a child.
>
> A.R.: It will.

Counsel: Will it be really hard to make an objective decision because a child is involved.

A.R.: I believe that it would be for me.

Counsel: Okay.

A.R.: But I want to, I feel like this is a job that we should all fulfill so . . .

Counsel: But, but it's not . . . some cases are not [inaudible] . . . this case because it involves a child, would that be hard for you to make an impartial decision?

A.R.: Maybe?

Trial court: How about I ask you this . . .

A.R.: It's not like I have experience, but it feels very uncertain.

TC: How about I ask you this way. If you had, I don't know let's just say a brother, and your brother was in Mr. Moulder's shoes, and he was up here and there was a trial. Would you want a person on the jury, that, that is thinking the way you're thinking, do you feel like that would disqualify . . .

A.R.: If you're innocent . . .

TC: a person?

A.R. innocent, no. I mean, because I think my, I think I lean towards . . .

TC: Well, let's say you didn't know because the idea is that everybody gets a fair trial. Everybody is entitled to a fair trial. No matter what they're charged with, or for that matter even for what they have done or not done, they're entitled to a fair trial. Right? So as Ms. Hunter pointed out, and as I said at the very beginning, as we all stand here today, we haven't heard any proof at all so nobody's guilty of anything.

A.R.: Right.

TC: Do what?

A.R.: Right.

> TC: Right. So, the only way that person can be found guilty is if after hearing all the evidence, a group of fair-minded jurors agree that the person, you know, they all agree that the person is guilty. So do you feel like that is something that you, you know . . . we're talking conceptually, right? Is that something that you would want to . . . to be . . . qualified . . . do you think you are qualified to be one of those people or do you not? And we're not trying, I'm not trying to get you to say yes, if you don't feel like it's yes. I want you to just tell me what's in your heart, you know.

After a pause of ten seconds, Juror A.R. answered, "I don't know. I mean, I'm sorry. I just . . . I mean it's not as though you've been a juror before and you're looking at someone's life . . . ."

We will pause our recounting of this colloquy here because at this point, almost exactly five minutes after it began, Juror A.R. has not once given a firm, unequivocal answer that she could be fair and impartial. She has been unequivocally equivocal on that question. The only time she expressed any firm degree of certainty was her answers to defense counsel that it would be hard for her to sit on the jury because there is a child involved and that she believed it would be hard for her to make an objective decision because a child is involved. At best, Juror A.R.'s answers had placed her within the gray zone, and that is not good enough. We resume our recounting of the colloquy where we left off. At this point, the Commonwealth begins asking clarifying questions.

> Commonwealth: But your feelings about children, your feelings having a child as a victim, would that qual . . . prevent you from being impartial in the case?
>
> Juror A.R.: Uh, maybe not. And I guess, I've just been listening to you all, maybe I'm feeling a little bit better about it. Maybe it's just normal uncertainty.

Defense counsel then interjects and brings the colloquy back around to Juror A.R.'s response to the trial court's hypothetical question about her brother.

Defense counsel understood her to say that if her brother was innocent, she would not want a juror like her sitting. The Commonwealth and trial court expressed doubt that that is what she meant. Juror A.R. then clarified that defense counsel was correct:

> Juror A.R.: No, that is what I said, um, at the time.
>
> Trial Court: Oh, I thought, I thought, she said it would depend on if he was innocent or not.
>
> Counsel: No, I think she said if he was innocent she would not.
>
> A.R.: Because I guess I lean towards the children.

At this point, the Commonwealth addressed the trial court explaining her belief that Juror A.R.'s answers were simply the product of inexperience with being a juror and natural uncertainty because of the subject matter of the case; but that she believed Juror A.R. would be impartial. The trial court then spoke at length about the requirements to sit on a jury and his belief as to Juror A.R. We will quote it in full because it demonstrates without doubt that, up to that point, the trial court did not believe Juror A.R. had given the answers he needed to hear to believe with certainty that she would be impartial. The trial court then explained, in front of Juror A.R., what he needed to hear her say before he could seat her on the jury. Given the several statements Juror A.R. had made regarding her desire to be a good juror and to fulfill her responsibility, this was too far past the line of proper discretion. The trial court said,

> TC: Well, what I think it boils down to for me, is that for me to have somebody on the jury I have to have somebody that will commit to me that if they swear to be impartial, they will be

impartial, and she said she couldn't, she didn't think she could do that. And if that's the case, then I, then I don't think . . .

Commonwealth: I didn't take what she said . . .

TC: Well, I asked her if I put her under oath, if I gave her an oath, would she be able to follow it and she said I don't know.

CW: Right.

TC: And I mean, uh, you can't have somebody that says I don't know you have to somebody that says yes.

Juror A.R.: Um . . .

TC: I mean, I'm not picking on you. I just mean, I just mean I think you have to have, you can't have somebody that says 'well I *think* I can presume somebody innocent.' I mean, you have to have somebody that says 'I presume them innocent. I will follow the rules.' Not I, it depends on what I hear, because what you hear doesn't matter, what, what, what you have to do is go-into-it-saying I will follow the rules. And if, if its going to be fact specific based on what you hear then that's fine if it is, because I mean, people, like we've said a million times, there are just certain things that people aren't cut out, certain kinds of cases people might not be cut out to do. And if that's the case then we need to know now and that's why we're spending this much time talking about this. Nobody's mad at you. But I, I'm just saying I have to have, for you to be on the jury you have to be able to say to me that 'I will be fair.' I'm not asking you for an outcome, you know . . .

A.R.: Okay.

TC: I'm not asking you to say 'I'm going to find this guy not guilty' and I'm not asking you to say 'I'm going to find this guy guilty.'

A.R.: I believe having this conversation I will be okay. I will be able to listen to the facts . . .

TC: It's really hard, it's really hard until you kind of break it all down and then, that's part of the thing. But I mean, so, so, so walking out of here what I have to have, and I'll say it again, but I mean, what I have to have is a team of jurors that each one of them can say, you know, I will listen to the evidence; I will apply the law; and I will be fair even if its un . . . distasteful what I'm hearing, and even if I get creeped out by what I'm hearing, or even

> if I don’t like the idea of peoples sexually abusing . . . you know, this isn’t a referendum on whether people should sexually, you know it’s a case about a specific set of circumstances, and a specific person, and a specific alleged victim, and you know, you have to base it on what you hear in here not how you feel about sexual abuse in general or, see what I mean? And if you feel like you can, then you can tell me that and if you feel like you can’t, you can tell me that. Because I have to trust your instinct.
>
> A.R.: I believe that I can, yes, I believe that I can.
>
> TC: I mean, do you feel like I made you say that?
>
> A.R.: No.
>
> TC: Because I don’t want to make you say that. I want to be, I want you to just tell me how you feel.
>
> A.R.: I believe that I can listen to the evidence fairly.

After this exchange the trial court then asked one final time if Juror A.R. could be fair and impartial and she affirmed she could.

We have several times declared that rehabilitation of a juror who has given a reasonable ground to doubt their impartiality is not merely inappropriate, but impossible. Rehabilitation is “[o]ne of the myths arising from the folklore surrounding jury selection . . . .” *Gabbard v. Commonwealth*, 297 S.W.3d 844, 853 (Ky. 2009) (quoting *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717-18 (Ky. 1991)). Once the reasonable ground has been established to doubt impartiality, the juror cannot be “asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court's instructions.” *Id.* (quoting *Montgomery,* 819 S.W.2d at 718).

> We understand and allow that a prospective juror's response that appears on its face to be disqualifying may be based upon a misunderstanding of the relevant facts or circumstances. Clarifying questions may be used as needed to ascertain the juror's true attitude about subjects of potential bias. But questions that merely induce the juror to change his mind or to retract a disqualifying remark do not automatically dissipate the 'reasonable ground' to believe the bias and partiality implicit in his initial remark.

Sturgeon, 521 S.W.3d at 194.

As our recounting of the colloquy demonstrates, the first five minutes saw Juror A.R. asked several times if she could be fair or impartial, in various formulas. Each time she answered that she didn't know or wasn't sure. It was obvious that there being a child-victim in the case caused her consternation. This was not a failure to grasp a legal concept—it was an honest answer that she was not sure she could be impartial because a child was involved. She was directly asked if that would make it hard for her to sit on the jury and hard for her to render an objective decision and, to these questions, she gave the only unequivocal responses: that she believed it would be. After the first five minutes of questioning, Juror A.R. had evinced a reasonable ground to believe she could not be impartial.

The record demonstrates the trial court did not believe Juror A.R. had, with certainty, expressed the ability to be impartial. The trial court knew Juror A.R. could not be seated at that point because she had been equivocal in her answers. In front of Juror A.R., he told the Commonwealth he could not seat her on the jury. Juror A.R. was likely discomfited by this statement. She had expressed several times that she wanted to be a good juror and good citizen. After the trial court said she had not satisfied the requirement, she began to

verbalize her discomfiture; this is demonstrated by the trial court addressing her specifically and telling her "I'm not picking on you," and "nobody's mad at you." But the trial court proceeded to tell her that he needed to hear her say she could be impartial, that she could be fair and weigh the evidence fairly despite the fact that a child was a victim in this case. It makes no difference the trial court did not compel her to make these affirmations or that Juror A.R. declared she had not been compelled to by the trial court.[5] The simple fact is Juror A.R. never made an affirmative declaration of impartiality until *after* the trial court announced in front of her that she would not be seated on the jury, and she could not be seated unless he heard her make such affirmative declarations. This is textbook rehabilitation; the search for "magic words" we have rejected time and again. *Gabbard*, 297 S.W.3d at 853. In the full context of the colloquy, such affirmative declarations did not dispel the reasonable ground to believe she would be partial to the child-victim, i.e., the Commonwealth.

III. Conclusion

Juror A.R.'s several statements in the first five-minutes of the colloquy established a reasonable ground to believe she would not be impartial. The trial court understood that she had been too equivocal in her answers to be seated on the jury. Only after the trial court told her what she needed to say before she could be seated on the jury did Juror A.R. affirmatively say she could be

[5] We do not mean to impugn the trial court either. An abuse of discretion can occur even with the best of intentions, but it remains an abuse of discretion, nonetheless.

fair and impartial. After a full review of the colloquy, the trial court's failure to strike Juror A.R. for cause was an abuse of discretion. Its decision was based on the affirmative declarations at the end of an otherwise, equivocal ten-minute colloquy. However true such declarations may have been, they were not enough to dispel the reasonable ground to believe she would be partial.

> This Court has granted the use of peremptory strikes to a party and made it mandatory for trial courts to excuse biased jurors for cause when a reasonable person would view the juror as biased. Not removing a biased juror from the venire, and thereby forcing a defendant to forfeit a peremptory strike, makes the defendant take on the duty of the court and prevents him from getting the jury he had a right to choose. This violates a substantial right accorded great weight in our legal history, and can never be harmless error.

Shane v. Commonwealth, 243 S.W.3d 336, 343 (Ky. 2007). Consequently, we reverse the convictions of Moulder. It is unfortunate that the victim in this case may yet again have to endure the vicissitudes of a trial. It is not our duty, however, to save convictions when they cannot be saved, but to uphold the law. In a similar vein, trial courts would do well to remember that they cannot save a juror who has evinced a reasonable ground to believe he or she will be partial. RCr 9.36(1). Humans are ill-equipped as it is to judge the truth in another person's heart; when there is a reasonable ground to doubt the impartiality of a juror, the doubt must control. *Sturgeon*, 521 S.W.3d at 194; *Wallace*, 478 S.W.3d at 298. This is the best we can do while still upholding the rights of the accused.

The judgment and sentence of the Barren Circuit Court is reversed. We remand for further proceedings consistent with the opinion.

All sitting. VanMeter, C.J.; Keller, Lambert, and Thompson, JJ., concur. Nickell, J., dissents by separate opinion in which Bisig, J., joins.

NICKELL, J., DISSENTING: Respectfully, I dissent. Our precedents distinguish "between potential jurors whose equivocation reflects merely careful thinking and a strong sense of responsibility in the face of such an important decision and those jurors whose equivocation signals an impaired ability to abide by the jury instructions[.]" *Brown v. Commonwealth*, 313 S.W.3d 577, 599 (Ky. 2010). Because the trial court carefully and conscientiously determined there was no reasonable basis to doubt Juror A.R.'s ability to render a fair and impartial verdict, I would affirm the judgment in all respects.

As the majority correctly notes, RCr 9.36(1) "is the only standard for determining whether a juror should be stricken for cause." *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 193 (Ky. 2017). Under this standard, we recognized "a juror who explicitly admits that he will not or cannot follow the law as contained in the instructions, has by definition identified himself as a 'doubtful' juror who must be excused for cause." *Id.* at 194. Nevertheless, we further explained

> that a prospective juror's response that appears on its face to be disqualifying may be based upon a misunderstanding of the relevant facts or circumstances. Clarifying questions may be used as needed to ascertain the juror's true attitude about subjects of potential bias. But questions that merely induce the juror to change his mind or to retract a disqualifying remark do not automatically dissipate the "reasonable ground" to believe the bias and partiality implicit in his initial remark. In this vein, we stated in *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007), that

> "a juror might say he can be fair, but disprove that statement by subsequent comments or demeanor so substantially at odds that it is obvious the judge has abused his discretion in deciding the juror is unbiased."

Id. Unlike the majority, I do not perceive that Juror A.R.'s equivocal responses placed her into the impermissible gray area. Thus, I cannot conclude the trial court obviously abused its discretion.

The determination whether reasonable grounds exist to doubt a juror's impartiality focuses on the entirety of the juror's responses, attitude, and demeanor. *Jackson v. Commonwealth*, 392 S.W.3d 907, 913 (Ky. 2013). This totality-of-the-circumstances approach requires the trial court "to evaluate the answers of prospective jurors in context and in light of the juror's knowledge of the facts and understanding of the law." *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008) (quoting *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001)). While doubts regarding a juror's impartiality may arise from any number of reasons,

> they often arise from a juror's having prejudged the defendant based on information, or supposed information, acquired outside of court; or from the juror's having some personal reason, such as a relationship with a trial participant or personal experience of a crime like the one alleged, to lean one way or the other.

Futrell v. Commonwealth, 471 S.W.3d 258, 272 (Ky. 2015).

The present record reflects an inexperienced young citizen earnestly grappling with the solemn responsibility of jury duty in a case involving a horrific set of facts. From A.R.'s lay perspective, it is unsurprising that she would express hesitancy and doubt in this situation. The trial court recognized

as much and pursued a line of clarifying questioning as permitted by our decision in *Sturgeon*. Conversely, the trial court repeatedly emphasized that it was not attempting to influence her answers in the manner forbidden by *Sturgeon*. In my view, Juror A.R.'s confused and equivocal responses did not rise to the level of objective bias condemned by our precedents. She did not articulate any inappropriate personal reasons for her equivocations other than a natural sympathy toward child victims. After the trial court educated her regarding the jury's proper role, she resolutely expressed confidence in her ability to be impartial. From the foregoing, the trial court could reasonably conclude, and did determine, the totality of her responses, including her overall demeanor and attitude, indicated a strong reluctance or aversion to confronting unpleasant allegations of child sexual abuse, rather than an inability, to fairly and impartially sift through the evidence to make factual findings and to apply the law as instructed to such factual findings to reach a verdict.

In closing, I reiterate the counsel of my predecessor, Justice Cunningham:

> we should more closely scrutinize juror questioning so as to be especially careful that we do not reverse serious criminal cases . . . because of imperfect answers given by prospective jurors. . . .
>
> Just as there are no "magic" words to rehabilitate a juror, there should be no "magic" words that automatically disqualify a juror.

McDaniel v. Commonwealth, 341 S.W.3d 89, 97 (Ky. 2011) (Cunningham, J., dissenting). Admittedly, this appeal presents a close call and reasonable minds may differ. However, the test for abuse of discretion is not merely whether an appellate court would have decided the issue differently than the trial court: it

is “whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Given the lack of objective bias and the trial judge’s superior ability to evaluate A.R.’s credibility and demeanor, I would have extended greater deference to his decision. Therefore, I respectfully dissent.

Bisig, J., joins.

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