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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002259-MR

CHRIS GLENDELL CARMICLE — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 01-CR-00065

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

VACATING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. Chris Carmicle appeals from a conviction of theft by unlawful taking over $300.00 and possession of marijuana. The appellant questions the sufficiency of the evidence of value and the denial of juror strikes for cause. We agree that three jurors should have been stricken for cause and were not, necessitating the appellant's use of all his

peremptory challenges. Therefore, we vacate the conviction and remand for a new trial.

Sometime in the evening of January 19, 2001, and/or the morning of January 20, 2001, the Barren County Attorney's Office and an adjacent furniture store were burglarized and vandalized. In the County Attorney's Office, computers were broken, water and urine had been poured over office equipment, and a fire extinguisher had been activated covering the office in white powder. The County Attorney testified at trial that there were two rolls of stamps missing, and some $550.00 in cash and change missing, based on the County Attorney's checkbooks and accounting ledgers. At the time of his arrest on the afternoon of January 20, Chris had a bag of marijuana sticking out of the upper pocket of his coveralls, a roll of stamps, some $27.00 in change, and the legs of the coveralls had the same white powder as in the fire extinguisher.

Earlier that morning, Chris Carmicle and three other defendants had been observed in Scott's Market exchanging change for folding money, buying lottery tickets, drinking cokes, and getting snacks. The store videotape captured all four defendants who were later identified as Chris Carmicle, the appellant herein, Ricky Jones, Larry York, and James Shaw. At the time of arrest that afternoon, all four defendants were together in Shaw's car.

The owner of the furniture store confirmed damage to his premises, a damaged back door, a cut mattress, light bulbs strewn throughout the building, and an empty cash register drawer. He speculated the cash taken was between $50.00 and $75.00.

Chris Carmicle was tried for two counts of burglary 3°, two counts of theft over $300.00, two counts of criminal mischief 1°, possession of marijuana, and possession of drug paraphernalia. He was convicted of one count of theft over $300.00 and of possession of marijuana. Chris received five years on the theft charge and twelve months plus a $50.00 fine for the possession charge, to run concurrently.

On appeal, Chris first contends there was insufficient evidence that he stole over $300.00 in value because he was not convicted of the burglary and he was found with only $27.00 plus a roll of stamps. We agree with the Commonwealth that the evidence against Chris was circumstantial, but that such evidence was sufficient to support a conviction. Here Chris was found with one of the missing rolls of stamps, a lot of change, fire extinguisher dust on his pant legs, a video of him exchanging change for folding money, spending money, and he was arrested early that afternoon in the company of the other three alleged accomplices. Reviewing the circumstantial evidence as a whole, we believe it would not be unreasonable for the jury to

find Chris guilty of theft over $300.00. See Howard v. Commonwealth, Ky. App., 787 S.W.2d 264 (1989); Collins v. Commonwealth, Ky., 933 S.W.2d 811 (1996); Graves v. Commonwealth, Ky., 17 S.W.3d 858 (2000).

Chris Carmicle next contends that he was forced to use three[1] peremptory jury challenges where the trial court should have stricken said jurors for cause. As a result of the court not striking jurors Smith, McDonald, and Crisp for cause, the defense used three peremptory challenges which it wanted to use for other jurors. We are unaware of whom the other three jurors were or if they eventually served.

One juror (Smith) was previously married to the ex-wife of one of the prosecution's witnesses. Smith stated he knew the witness for many years, but did not think he would be swayed one way or the other because of the relationship. The trial court denied a challenge for cause after asking Smith if he would be for or against a side based on the testimony of that witness, to which he responded, "I think I could listen to it."

Another juror's (McDonald) daughter-in-law worked for the County Attorney's Office, the victim herein. The court denied a request to excuse for cause, asserting that the relationship was too remote.

[1] He states three but presents four jurors and argues three.

The third juror's (unidentified) wife's niece also worked at the County Attorney's Office. The court denied a request to strike for cause. Again, the court felt the relationship was too remote.

Finally, a juror (Crisp) volunteered that the prosecutor (Karen Davis) in this case had previously represented her daughter and two grandchildren in juvenile court. In response to a question, she stated that if Karen was not a prosecutor, she would consider hiring her again because she did a good job. Although Karen Davis did not remember the particular case, she said it would have been when she was with the County Attorney in 1999. The court denied a request for dismissal for cause because "Karen was never in private practice." The court then asked the juror if she would vote for Karen Davis's side because of said relationship. The juror responded that she had never met Karen Davis, that she only volunteered the information because of the connection.

The Sixth Amendment to the United States Constitution and Sections 7 and 11 of the Kentucky Constitution establish the right to an impartial jury. Bolen v. Commonwealth, Ky., 31 S.W.3d 907, 910 (2000). RCr 9.36 requires prospective jurors be stricken for cause where there is a reasonable ground to believe he or she cannot be fair and impartial. The standard of review for a trial court's decision on a challenge for cause is whether

there was an abuse of discretion. Bolen, 31 S.W.3d at 910; Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), cert. denied, 522 U.S. 986, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997). In order to find reversible error, a defendant must demonstrate a probability of bias or prejudice based on the particular facts of the case. Bolen, 31 S.W.3d at 910, citing Pennington v. Commonwealth, Ky., 316 S.W.2d 221, 224 (1958).

In the case sub judice, juror Smith knew one of the prosecution's witnesses, and had been married to the ex-wife of the witness. Although juror Smith thought he could listen to the witness' testimony, we believe he should have been excused for cause. In Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999), a juror likewise knew a witness for many years, having played Little League baseball and having gone to high school together. Although the juror had not seen the witness in years and in rehabilitation did not believe he would be biased in favor of the prosecution, our Supreme Court opined the juror should have been stricken for cause. Doubts about unfairness are to be resolved in favor of the defendant. Fugate, 993 S.W.2d at 939, citing Randolph v. Commonwealth, Ky., 716 S.W.2d 253, 255 (1986).

The second juror, McDonald, had a daughter-in-law that worked for the County Attorney's office, the victim herein. The trial court thought the relationship was too remote to strike

for cause. "[A] juror should be disqualified when the juror has a close relationship with a victim, a party or an attorney, even if the juror claims to be free from bias." Butts v. Commonwealth, Ky., 953 S.W.2d 943, 945 (1997).

> "[I]rrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses."
>
> Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror.

Ward v. Commonwealth, Ky., 695 S.W.2d 404, 407 (1985), quoting Commonwealth v. Stamm, 286 Pa. Super. 409, 429 A.2d 4, 7 (1981).

Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 256-257 (1993), established that the relationship by affinity is to be treated the same as a blood relationship, and held that a juror who was married to the prosecutor's first cousin should have been per se stricken for cause. Per Thomas, we conclude that a prospective juror whose daughter-in-law worked for the victim should have been stricken for cause. See also, Marsch v. Commonwealth, Ky., 743 S.W.2d 830 (1987); Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991).

The unidentified juror was similar to McDonald in that his wife's niece worked in the County Attorney's office. Per

Thomas, we conclude this relationship would likewise require this juror to be stricken for cause. However, as the appellee points out, we do not know if this juror sat, or was stricken by either party.

Finally, the last juror (Crisp) stated that the prosecutor had represented her daughter and two grandchildren in juvenile court and that she had done a good job. Crisp herself, however, had not previously met the prosecutor. "[A] trial court is required to disqualify for cause prospective jurors who had a prior professional relationship with a prosecuting attorney and who profess that they would seek such a relationship in the future." Fugate, 993 S.W.2d at 938, citing Riddle v. Commonwealth, Ky. App., 864 S.W.2d 308 (1993). Although it was Crisp's daughter and grandchildren, rather than Crisp herself, who were represented by the prosecutor, we conclude the relationship sufficiently close such that juror Crisp should have been stricken for cause. Fugate, 993 S.W.2d at 938-939; Thomas 864 S.W.2d 252; Ward, 695 S.W.2d at 407.

Appellant used all of his peremptory challenges, three of which were used on jurors that should have been stricken for cause. In Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 374 (2002), the Court stated:

> For Appellant's challenge to succeed, it is not necessary that an unqualified juror actually sat on the jury. As the Court

> noted in *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252, 259 (1993), it has always been the law in Kentucky "that prejudice is presumed, and the defendant is entitled to a reversal in those cases where a defendant is forced to exhaust his peremptory challenges against prospective jurors who should have been excused for cause." All that is required is that "[a] party must exercise all of his peremptory challenges in order to sustain a claim of prejudice due to the failure of the court to grant a requested challenge for cause." *Thomas*, citing Abramson, Kentucky Practice, (Criminal Rules) Vol. 9, Sec. 25.50 (1987).

Our decision to vacate and remand is not dispositive of appellant's additional issues since they may arise at a second trial. Chris argues that the police officer should not have been able to review the store's surveillance tapes and identify Chris as one of the defendants. As stated earlier, Scott's Market had a videotape of Chris and others from the morning after the burglary. The tape was played to the jury while Detective England identified Chris Carmicle and pointed out where and what he was doing throughout the tape. Chris, relying on Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988), contends the identity of the individuals in the tape is a matter for the jury and that it was error to allow Detective England to give his interpretation of images on the tape. Sanborn, however, is not on point but involves an inaudible tape recording. The facts in this case are more like those in Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999), which involved the

admissibility of a police detective's testimony which was a narrative of a videotape of the crime scene. In allowing the testimony, the Court held this was proper lay testimony under KRE 701 when read in conjunction with KRE 602 because "it comprised opinions and inferences that were rationally based on Partin's own perceptions of which he had personal knowledge. Further, we conclude the testimony was helpful to the jury in evaluating the images displayed on the videotape." Id. at 488. See also Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993).

Chris next objects to the testimony of Sergeant Duff that dust found on Chris's coveralls when arrested appeared to be the same as the fire extinguisher dust sprayed all around the County Attorney's Office. Although Officer Duff had seen both Chris's coveralls and the County Attorney's Office, the objection is that under KRE 702, Officer Duff was not an expert witness on chemical compounds, nor a chemist, and therefore unqualified to testify as he did. Although Officer Duff may not be qualified to testify as an expert witness on the chemical compounds of the fire extinguisher contents, we believe that under KRE 701 he may express a lay opinion that the dust on Chris's coveralls appeared to be the same color, texture, etc. of that he observed in the County Attorney's Office. This situation is similar to that in Crow v. Commonwealth, Ky., 38 S.W.3d 379 (2001), in which a lay witness testified that the

substance he saw on appellant's kitchen floor appeared to be blood. The Court allowed the testimony in under KRE 701 because "[h]is testimony was rationally based on his own perception of what he personally observed and was helpful in determining a fact in issue, . . ." Id. at 384. See also King v. Ohio Valley Fire & Marine Insurance Co., 212 Ky. 770, 280 S.W. 127 (1926).

Chris also objects to the deputy jailer, Mike Rich's, testimony wherein he read the heights and weights of Chris Carmicle and Larry York from the jail booking sheets. KRE 803(6) permits the admission of business records into evidence. The records were available at trial, could have been admitted themselves, and deputy jailer Rich was subject to cross-examination. A party presenting a business record is allowed to read from the business record at trial. Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6 (1998); Jones v. Commonwealth, Ky. App., 907 S.W.2d 783 (1995). If there was any error in not admitting the records first, it was harmless.

Chris also objected to Detective England's statement to the effect that he searched the York vehicle but could not go into his findings as to Mr. York at this time; and the detective's opinion that only these four defendants were involved in the two break-ins. Chris contends this testimony makes a mockery out of KRE 402, Amendment IV to the U.S. Constitution, and the Kentucky Constitution, Section 11. KRE

402 requires only relevant evidence be admitted. Since Chris was arrested with York in the car, that evidence was clearly relevant. The other evidence in the car that showed York's guilt, but not Chris's, was not relevant in Chris's trial, and the prosecutor was correct in discontinuing further questioning on that subject. The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures, and Section 11 of the Kentucky Constitution gives an accused a right to testify on his own behalf or to remain silent; the right to an attorney; to cross-examine witnesses; to subpoena witnesses; and to have a speedy trial by jury. Without a more detailed explanation of the errors by Chris, we do not see any error in this line of questioning.

Finally, Chris contends he was entitled to a mistrial after it was revealed that two courthouse personnel had heard part of the in-chambers conversation between counsel and the judge on the court monitors, although they stated that what they heard was not intelligible to them. The granting of a mistrial is an extraordinary form of relief which requires manifest necessity for such action. Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166 (1978). The case was tried by a jury, not the courthouse personnel. If the jury did not hear it, we do not see that there was any error in whatever was said.

For the foregoing reasons, the conviction of the appellant is vacated and the matter remanded for a new trial.

McANULTY, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS WITH RESULT AND FURNISHES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING BY SEPARATE OPINION. I concur with the majority opinion to the extent it states that Carmicle is entitled to a new trial because Juror McDonald was not stricken for cause by the trial court. However, I conclude that the trial court was within its discretion in not striking Juror Smith for cause. As for Juror Crisp and the unidentified juror, I would also yield to the discretion of the trial court, although the question is much closer with these two jurors as opposed to Juror Smith.

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