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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000795-MR

LASHOAN M. MORRIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NOS. 02-CR-000482 AND 02-CR-002503

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE: LaShoan Morris appeals his conviction in the Jefferson Circuit Court. At trial it was established that Morris was an inmate at the Community Corrections Center in Louisville, and had been released on daytime work release. Upon his return to the facility on December 21, 2001, marijuana was found on Morris and he was involved in an altercation with a deputy in the corrections center. During the struggle with the deputy, the deputy’s knee was injured.

Following the jury trial, Morris was convicted of assault in the third degree and resisting arrest. The jury did not reach a verdict on the remaining charges at trial, and Morris plead guilty by a conditional guilty plea, RCr 8.09, to promoting contraband in the first degree, tampering with physical evidence, illegal possession of a controlled substance (marijuana), and illegal possession of drug paraphernalia. By his conditional plea, Morris reserved the right to appeal any issues which he could have appealed if he had been convicted of them at trial. RCr 8.09.

Morris first claims that the trial court erred in denying his motion to strike certain jurors for cause. During voir dire, defense counsel informed the jury venire that the case against Morris included a promoting contraband charge. Counsel informed them this meant the case involved the fact that Morris was in custody at the time the charges occurred. Counsel asked:

> Is there anybody here who thinks that you wouldn't be able to be impartial in this case just by virtue of the fact that LaShoan Morris was actually serving time in the county jail at the time that these offenses occurred? Does anybody here think that that would make them view him in a different light than if that weren't the situation?

One juror on the venire opined that if Morris was "already there, he should not have had contraband to begin with."

Defense counsel asked that juror whether by virtue of the fact that Morris was an inmate at the time it would or could affect his judgment. The juror answered affirmatively. Another juror, 43421, spoke up and indicated he agreed with that.

Defense counsel then asked for a show of hands from "anyone here who feels that their opinion could be a bit biased just by the fact that LaShoan was an inmate in the county jail." Counsel examined those who raised their hands. Juror 46475 stated, "I think it would make an impression." Counsel asked if it could affect her judgment in the case, and the juror said yes. Juror 46421 raised her hand. Defense counsel asked her if she shared the opinion that it would affect her judgment. She answered yes. Juror 44619 stated that she shared that opinion. Juror 14782 stated that he shared the same opinion. Another juror spoke up and commented that the jurors did not know the seriousness of the charges for which Morris was in jail. Defense counsel questioned her a little further, after which the juror stated that she did *not* think the fact that Morris was in jail would affect her judgment.

Defense counsel asked if anyone else's judgment would be affected by the fact that LaShoan was in custody. Juror 47129 stated, "He must have done something to be in jail to begin with. I don't know exactly what he's done, I mean, they're not gonna discuss that, but he must have been in jail

for some reason." Defense counsel asked, "So you feel that your judgment would be affected, that you would be more inclined to feel he were guilty?" The juror's answer is inaudible. Finally, defense counsel asked if anyone else shared that feeling. Juror 34924 indicated that he felt that way too. Another juror asked if they could find out what he was in jail for. A bench conference ensued and the parties agreed that the court should admonish the panel that Morris' previous charge was not relevant. The trial court advised defense counsel to take up a new line of inquiry. The court then admonished the jury, and defense counsel began questioning the panel on a different topic.

After the defense concluded its voir dire, the court heard the parties' motions to strike for cause. Defense counsel moved to strike jurors 34924, 49173, 43421, 44619, 46475 and 46241 on the basis that they expressed bias against Morris due to the fact that he was an inmate at the time the offenses occurred.[1] The court observed that the fact the defendant was an inmate was an element to be proved at trial. The judge stated that she did not hear anyone say they were biased against Morris, and she would have noted that because bias would have been "legally significant." The court opined that to the extent

[1] Not all of the jurors stated their numbers on the videotape record. The Commonwealth does not challenge the accuracy of the juror numbers and so we accept that the identifications in the motion to strike were correct.

someone stated that something would affect their judgment that was not "a disqualifying event" but that if one or more of them had said they were biased, that would be disqualifying. The court denied the motion to strike. Defense counsel used all nine peremptory challenges, and with them struck five of the jurors listed above.

On appeal, Morris argues that these jurors demonstrated a biased opinion toward incarcerated defendants, particularly those who "re-offend." He alleges the judge's refusal to excuse them for cause was an abuse of discretion. 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 9.36(1). A criminal defendant "is entitled to be tried by a fair and impartial jury composed of members who are disinterested and free from bias and prejudice, actual or implied or reasonably inferred." Alexander v. Commonwealth, 862 S.W.2d 856, 864 (Ky. 1993) (quoting Tayloe v. Commonwealth, 335 S.W.2d 556, 558 (1960)), overruled on other grounds, Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997). It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause. Id.

Whether a juror should be excused for cause is within the sound discretion of the trial court and the court's decision

will not be disturbed absent a clear abuse of discretion. Foley v. Commonwealth, 953 S.W.2d 924, 931 (Ky. 1997). When reviewing a trial court's decision regarding juror impartiality, we review the totality of the circumstances. Montgomery v. Commonwealth, 819 S.W.2d 713, 718 (Ky. 1991). Further, we must presume prejudice when a criminal defendant has been forced to exhaust his peremptory challenges on jurors who should have been stricken for cause. Gamble v. Commonwealth, 68 S.W.3d 367, 373 (Ky. 2002).

We agree that the trial court abused its discretion. The jurors in this case certainly expressed prejudgment of Morris, and bias can be reasonably inferred from their comments. A juror need not be explicit or use legal terminology or any particular words before an inference of bias can be made. Impartiality is not a "technical conception," but is a state of mind and a "mental attitude of appropriate indifference." Montgomery, 819 S.W.2d at 718, quoting United States v. Wood, 299 U.S. 123, 145-146, 57 S. Ct. 177, 185, 81 L. Ed. 2d 78 (1936).

We find that their statements that their judgment would be affected by Morris's criminal record indicated that they did not possess indifference or freedom from bias. Furthermore, the court did not further probe their attitudes to determine how their judgments would be affected or whether they

could afford Morris the presumption of innocence and follow the law despite that predisposition. Thus we have no way of determining whether they could have done so, but we can only infer from what was stated on the record that their judgment would have been affected negatively. Any doubt about the competency of a particular juror should be resolved in favor of the defendant. Humble v. Commonwealth, 887 S.W.2d 567, 571 (Ky.App. 1994). Because bias could be inferred, we conclude that these jurors should have been stricken for cause, and that Morris was prejudiced in that he was forced to use his peremptory challenges to strike them from the panel.

Since these jurors should have been stricken for cause, it is necessary to vacate his conviction in its entirety. When Morris plead guilty to the remaining charges by a conditional guilty plea, he reserved the right to appeal any issues which he could have appealed if he had been convicted of them at trial. RCr 8.09. Thus, we vacate the charges on which Morris was convicted pursuant to the conditional guilty plea. We now review only those remaining issues on appeal which might arise on remand.

Morris claims that the trial court's instructions on assault in the third degree were incomplete. He believes that the jury should have been informed that it could not find he

possessed an intentional or wanton mental state if it found his actions were accidental or unintentional.

The jury was instructed on assault in the third degree under KRS 508.025(b): a person is guilty of assault in the third degree when, being a person confined in a detention facility, he inflicts physical injury upon an employee of the facility. Under the language of the statute, in order to convict of that offense a jury must find the actor had either a wanton or intentional mental state at the time of the offense. Covington v. Commonwealth, 849 S.W.2d 560 (Ky.App. 1992). Morris argued below that his defense to the charge was that of accident, and the definitions for "wantonly" and "intentionally" did not inform the jury that his conduct was not encompassed by the assault in the third degree charge if it found he acted unintentionally or accidentally. He further alleges his defense was akin to the legal definition of reckless, and the jury should have been instructed that this was a wholly different mental state which if found would exonerate him of the assault in the third degree charge.

We agree with the trial court that additional instructions were not necessary. The general rule requires that instructions be given applicable to every state of the case covered by the indictment and deducible from or supported to any extent by the evidence. Manning v. Commonwealth, 23 S.W.3d 610,

614 (Ky. 2000). However, the rule does not require the giving of an instruction on the defense's theory in every instance. If the instruction is couched in such language as the ordinary layperson on the jury can easily understand, and its negative adequately covers the defense of the accused, it is unnecessary to give an affirmative instruction on the theory of the defendant. Himes v. Commonwealth, 350 S.W.2d 637 (Ky. 1961). It is thus unnecessary to give a defensive instruction on the theory of accident because in order to find the defendant guilty the jury necessarily must negate the explanation of accident. Hendricks v. Commonwealth, 550 S.W.2d 551, 553 (Ky. 1977). We additionally disagree with Morris's assertion that the jury should have been given an instruction distinguishing recklessness from the applicable mental states in this case. We conclude under Himes it would be inappropriate to give an instruction to the jury on what was *not* charged. We thus find no error in the instructions.

Morris next argues that his guilty plea to the offenses of promoting contraband in the first degree and possession of a controlled substance (marijuana) violate double jeopardy principles. This argument was also preserved pursuant to the conditional guilty plea and, in any event, probably would arise again on remand.

Morris argues that possession of marijuana is a lesser included offense of promoting contraband since it is established by proof of less than all the facts necessary to prove the latter offense. KRS 505.020(2)(a). That statute codifies the test in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932):

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

In applying the Blockburger test, the focus is on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence which would be presented at trial. Mack v. Commonwealth, 136 S.W.3d 434, 438 (Ky. 2004). The court's analysis should rid the statute of alternative elements that do not apply, because theoretically a criminal statute written in the alternative creates a separate offense for each alternative and should therefore be treated for double jeopardy purposes as separate statutes would. Id. The court then determines whether the two offenses in question should be characterized under Blockburger as distinct offenses authorizing cumulative sentences. Id.

The proper application of the Blockburger test, therefore, involves analysis of the two statutes under which

Morris was charged and which are at issue. Promoting contraband in the first degree as defined in KRS 520.050, and as described in the instruction to the jury, requires knowing introduction of a controlled substance into a corrections center. Possession of a controlled substance, as defined under KRS 218A.1422, requires possession of a controlled substance known to be a controlled substance. While promoting contraband contains elements which the possession of a controlled substance statute does not, we do not find any separate elements in the possession statute not contained in the promoting contraband statute. Thus, we agree that in this instance, conviction on both statutes violated the Blockburger test.

The remaining arguments made by Morris on appeal we regard as moot or unlikely to reoccur on remand, and therefore we decline to address them. For all of the foregoing reasons, we vacate Morris's convictions and remand for further proceedings consistent with this opinion.

JOHNSON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in part and dissent in part. I do not believe that the trial court erred in refusing to strike potential jurors for cause. I find no basis for the majority to conclude

that the prospective jurors could not reach a fair and impartial verdict merely because they expressed concern over the fact that Morris was in jail at the time he allegedly committed these new offenses. The fact that Morris was in custody was an element of some of the crimes alleged. The jurors had to be informed of this fact for the jury to make its determination. I do not believe Morris has shown that the judge abused her discretion in not excusing the jurors nor that the jurors were in fact biased against him.

I concur with the remaining aspects of the majority opinion. In that the possession of marijuana charge does result in double jeopardy, I would reverse Morris's conviction on that charge. Since dismissal of that charge (a misdemeanor sentence to run concurrent with a felony sentence) does not affect the sentence imposed, I would affirm Morris's convictions and sentence, and remand to correct the judgment to reflect the dismissal of the marijuana charge.

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