RENDERED: AUGUST 19, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000992-MR

GEORGE WILLIAMS — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 03-CR-00196

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: On March 31, 2004 a judgment of conviction and sentence was entered finding George Williams (Williams)[1] guilty on three counts of reckless homicide and sentencing him to five years on each count to run consecutively. The convictions arise out of an incident occurring on June 23, 2003 when a coal auger Williams was hauling on U.S. Route 23 in Pike County, Kentucky came off the low boy truck he was driving and struck two cars with three persons, all of whom died as a result. On appeal

[1] The notice of appeal identifies Billy Lester as the appellant. This appears to be a typographical error.

Williams raises five arguments for reversal of his conviction and sentence. We affirm.

Williams was employed by JZ Trucking, Inc. and had been instructed to go to a site in Lawrence County, disassemble the 32-ton coal auger and haul it to an Island Creek Coal Company site in Pike County. It took several days to disassemble the auger and Williams was assisted by others in this endeavor. Williams drove the auger to Pike County on June 20, 2003 and parked the truck with its load in town for the weekend.

On Monday, June 23, 2003, Williams, along with several other people, met to drive the auger to the Island Creek Coal Company site. The other individuals accompanied Williams in other vehicles – Williams operated the low boy alone.

49 CFR 393.106, adopted by Kentucky through 601 KAR 1:005 Section 2, requires a certain number of chains be used to secure a load such as the coal auger in this case. The number of chains depends upon the weight of the load and the strength of the chains. There is a dispute in this case regarding how many chains were used to secure the auger and how many were necessary. Four chains were found after the incident and the Commonwealth’s evidence is that this number is insufficient to secure the load.

While transporting the auger on U.S. Route 23 in Pike County, Williams lost control of the low boy truck and the auger broke free of the chains, coming off the truck and hitting oncoming traffic. It hit a vehicle driven by Carolyn Adkins and killed her instantly. It also hit a truck with brothers-in-law Larry Smallwood and Dudley Williams causing the truck to burst into flames and also killing the truck's occupants.

How Williams lost control and the accident occurred is disputed by the parties. Williams claims a wooden crib block on the driver's side of the truck, being used to prevent the auger from resting directly on the truck's tires, "exploded" and caused slack in one of the binder chains. The load shifted causing the chains holding the auger to snap and releasing it from the truck bed. The Commonwealth, on the other hand, claims Williams was exceeding the speed limit, took a curve too fast, grazed the median on the four-lane highway and started to lose control. He then locked up his brakes, skidded 113½ feet, and the truck fish tailed. These events caused the chains holding the auger to snap and break free into oncoming traffic.

After the incident media coverage of the event contained false reports of drug or alcohol use being involved in the accident. Further articles highlighted DUI charges in Williams' past and the trucking company's woes involving drivers it employed.

Williams contends a fair and impartial jury could not be impaneled and the court should have granted his motion for a change of venue. He bases this argument on several things: (1) the media coverage (newspaper, radio, and television) was pervasive up to the time of the trial in January 2004. The accounts were prejudicial and related inaccurate information (drug and/or alcohol use) not admitted at trial. (2) Of the potential venire persons called, only three had not heard of the case. Only one of those persons was selected to sit on the jury. And, (3) Pike County is an insular community.[2]

The Commonwealth responds that Williams has not preserved the argument for review, he did not comply with KRS 452.220(2), and the trial court did not abuse its discretion by denying Williams' motion.

Clearly, Williams preserved the argument for review. He filed a motion to change venue prior to trial, the trial court discussed the motion at various times with counsel, ultimately deciding to wait until it could be determined whether or not a jury could be seated before ruling on the motion, and after conducting *voir dire*, denied Williams' motion.

[2] Williams also alleges that a family member of one of the victims positioned himself outside the courtroom with a bumper sticker on his car that read "Justice for Dudley." Williams claims this is third-party contact with the jury requiring reversal. We disagree. This is not the type of forbidden third-party contact from an individual such as expressing opinion on what the jury's findings or sentence should be; moreover, the bumper sticker did not urge the jury to take any particular action.

KRS 452.220(2) requires a defendant to file a verified petition supported by at least two affidavits by persons who are not kin to or counsel of the defendant. Any affidavit so filed must state that the person is "acquainted with the state of public opinion in the county objected to, and that they verily believe the statements of the petition for the change of venue are true."[3] The Commonwealth argues the directive of the statute is mandatory and the affidavits filed in support of Williams' petition do not state "that they verily believe the statements of the petition for the change of venue are true" rendering them defective and the motion properly denied.

The case law has long held a defendant must strictly meet the conditions in KRS 452.220(2). Failure to do so is fatal to a claim of error on appeal.[4] The specific language lacking in the affidavits in this case has been held to be mandatory.[5]

While we might be justified on the basis of this case law in refusing to review the issue any further, a defendant is entitled to receive a fair trial and community bias can make a

[3] KRS 452.220(2).

[4] *Lewis v. Commonwealth*, 42 S.W.3d 605, 609 (Ky. 2001).

[5] *Whitler v. Commonwealth*, 810 S.W.2d 505, 506 (Ky. 1991).

change of venue constitutionally required.[6] Thus, we will review the merits of Williams' argument.

Whether to grant a motion changing venue is within the discretion of the trial court. Its discretion is broad and will not lightly be disturbed.[7]

There is no doubt that this case garnered its share of publicity through various media sources. But simply hearing, talking, or reading about a case does not require a change of venue. Williams must also show prejudice unless it can be clearly implied from the circumstances in the case.[8]

Williams argues prejudice can fairly be implied in this case pointing to the media accounts with particular emphasis on the false reports of drug and/or alcohol abuse, only three potential venire persons had not heard of the case, and the close nature of the community in Pike County.

Williams is not entitled to a jury that is totally ignorant of the case.[9] And while Williams has pointed out that most of the potential venire persons had heard of the case he does not identify evidence that anyone who was not excused, not

---

[6] *Jacobs v. Commonwealth*, 870 S.W.2d 412, 415 (Ky. 1994).

[7] *Bennett v. Commonwealth*, 978 S.W.2d 322, 325 (Ky. 1998); *Jacobs*, 870 S.W.2d at 415.

[8] *Stopher v. Commonwealth*, 57 S.W.3d 787, 796 (Ky. 2001)(quoting *Montgomery v. Commonwealth*, 819 S.W.2d 713, 716 (Ky. 1991)). *See also*, *Bennett*, 978 S.W.2d at 325.

[9] *Jacobs*, 870 S.W.2d at 416.

struck for cause, or was seated had preconceived notions of his guilt or knew of/believed the stories regarding drug and/or alcohol abuse.

It is clear the trial court in this case carefully and thoroughly considered Williams' motion to change the venue of the trial. It reserved ruling until completing *voir dire*. *Voir dire* itself was conscientiously and meticulously performed not only with general questions to the entire panel but also individually in chambers. Williams has only shown that many of the potential jurors had heard of the case. He has not shown any actual prejudice, implied prejudice, or that jurors had preconceived notions of his guilt. This is not enough to warrant a change in venue, thus, we hold the trial court did not abuse its discretion by denying the motion.[10]

Williams' next argument is there exists insufficient evidence to support his conviction for reckless homicide. On appeal, the standard of review applied to the denial of a motion for a directed verdict is whether, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt."[11]

[10] *Stopher*, 57 S.W.3d at 796; *Fugate v. Commonwealth*, 993 S.W.2d 931, 940 (Ky. 1999).

[11] *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

To be convicted of reckless homicide the Commonwealth must prove that Williams caused the death of another person with recklessness.[12] Recklessly is defined by KRS 501.020(4) and requires, in this case, a failure "to perceive a substantial and unjustifiable risk that the result will occur" and the risk "constitutes a gross deviation from the standard of care of a reasonable person" in the situation.[13]

Much of Williams' argument is devoted to rehashing the evidence in the case. It is clear the facts of the case on key issues such as whether Williams was speeding, whether the proper number of chains had been used to tie down the load, and whether the crib block exploded or Williams grazed the median were all disputed. On motion for a directed verdict it must be assumed the evidence for the Commonwealth is true.

On appeal, as we have stated, the question is whether it would be clearly unreasonable for a jury to find guilt under the totality of the case. Here, the jury believed Williams was speeding and used an improper number of chains. We cannot say a jury's judgment that these two factors, combined with the fact that Williams was hauling an object weighing 32 tons (obviously capable of causing massive damage), is reckless as defined in KRS 501.020(4) is an unreasonable conclusion.

[12] KRS 507.050(1).

[13] KRS 501.020(4).

Williams' reliance on *Johnson v. Commonwealth*,[14] is misplaced. In *Johnson* the Kentucky Supreme Court reversed a conviction for wanton murder finding the evidence insufficient where the operator of a coal truck may have run a red light and may have been speeding.[15] In *Johnson* the Supreme Court was considering the requirements of wanton murder, not reckless homicide. The two demand different levels of culpability. Moreover, each case must be taken on its own unique facts. It may be that had the jury convicted Williams of wanton murder this argument would present a closer question but it is not a foregone conclusion that the outcome in *Johnson* would dictate the outcome here.

Williams next argues the indictment was insufficient by failing to charge a public offense. We find no merit in this argument. Williams was fairly aware of the nature of the charges against him and able to prepare his case for trial.[16]

In its opening statement the Commonwealth told the jury it would introduce evidence that Williams had been driving in excess of the posted speed limit. Williams' counsel moved for a mistrial at this juncture on the basis that witness statements to that effect were not provided to the defense prior

---

[14] 885 S.W.2d 951 (Ky. 1994).

[15] Id. at 952-953.

[16] *Johnson v. Commonwealth*, 864 S.W.2d 266, 273 (Ky. 1993).

to trial in violation of RCr 7.26. The court denied the motion. On appeal Williams continues to maintain this was error.

RCr 7.26 requires only that written statements be made available to the defendant prior to trial.[17] The testimony introduced by the Commonwealth regarding the speed at which Williams was traveling was not based on written statements. Thus, the failure to provide this information prior to trial is not grounds for reversal.

In his final argument Williams contends his conviction should be reversed because of comments made by the prosecutor in his closing argument. Williams complains the Commonwealth repeatedly accused the defense of lying to the jury and argued facts not in evidence. The prosecutor remarked that Joey Stidham, an expert for Williams, testified that Williams was out of control of the truck, could not make the curve, was traveling between 65-70 mph, the truck began to rock, and Williams locked up the brakes. Stidham never made these statements during his testimony.

We must review this alleged ground for reversal under the palpable error standard in RCr 10.26 since Williams did not make a contemporaneous objection. A palpable error is one that affects the substantial rights of a party resulting in manifest injustice. In order to find palpable error occurred an

[17] *Yates v. Commonwealth*, 958 S.W.2d 306, 308 (Ky. 1997).

appellate court must believe there is a substantial possibility that the outcome would have been different had the error not occurred.[18]

In general, a prosecutor should confine his arguments to reasonable comments on the evidence and fair inferences that can be drawn from that evidence.[19] The Supreme Court has stated that the focus when considering whether there has been prosecutorial misconduct should be on the overall fairness of the trial and a determination should be made if the conduct was so egregious as to deny the defendant due process of law.[20]

Measured by this standard, as well as guided by the standard for finding palpable error, we do not believe any improprieties in the Commonwealth's closing argument were so egregious as to deny Williams due process. Nor do we believe there is a substantial possibility that the outcome of the trial would have been different.

Accordingly, the judgment of the Pike Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

---

[18] *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). *See also*, *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003).

[19] *Dennis v. Commonwealth*, 526 S.W.2d 8, 10 (Ky. 1975).

[20] *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411-412 (Ky. 1987) *See also*, *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky.App. 1990).

TAYLOR, JUDGE, CONCURS IN RESULT BUT WILL NOT FURNISH SEPARATE OPINION.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky