

RENDERED: JUNE 23, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000237-MR

ROSE ELAINE BAILEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 03-CR-003229

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND HENRY, JUDGES; MILLER, SPECIAL JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: Rose Bailey appeals from a final judgment of the Jefferson Circuit Court following a jury verdict of guilty on one count each of assault in the second degree, assault in the third degree, resisting arrest and disorderly conduct.

Bailey claims that the trial court erred in failing to strike a juror for cause, failing to instruct the jury on voluntary intoxication, and failing to instruct the jury in a manner consistent with the presumption of innocence and burden of

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<sup>1</sup> Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

proof. For the reasons stated below, we affirm the judgment on appeal.

On December 8 and December 29, 2003, Bailey was indicted by the Jefferson County grand jury on charges of attempted murder, second- and third-degree assault, first-degree criminal mischief, resisting arrest, disorderly conduct and theft of identity. The charges arose from an October 8, 2003, altercation Bailey had with Reginal Barber in Jefferson County, Kentucky. When Bailey was located by Louisville police officers and an investigation was undertaken, Bailey struck officer Beth Bizzell in the face, knocking her to the ground. As officers were attempting to restrain Bailey, she struck Bizzell in the jaw and bit her on the hand. Bailey also struck officer Claudette McCracken with a beer bottle. Bailey was pepper sprayed and struck with a baton, and was taken into custody when other officers arrived. She was found to be infected with HIV and hepatitis C, which necessitated Bizzell to undergo a prophylactic antiviral regimen. The blood test also revealed that Bailey had a blood alcohol level of 0.16 and had ingested cocaine.

Bailey was later diagnosed with schizoaffective disorder, the symptoms of which were improved with medication. A competency evaluation was conducted, after which a medical

doctor opined that Bailey was competent to stand trial if she continued to take her medication.

A jury trial was conducted in October 2004, during which some of the charges were dismissed. The jury returned a not guilty verdict on the attempted murder charge and guilty verdicts as to second- and third-degree assault, resisting arrest and disorderly conduct. Bailey received a total sentence of seven years in prison. The judgment of conviction and sentence was entered on December 28, 2004, and this appeal followed.

Bailey first argues that the trial court committed reversible error by refusing to strike a juror for cause. Bailey, through counsel, objected to juror Ricky Heine because Heine was a police officer. Heine stated in voir dire that he knew some of the officers who had worked on the case, but said that he had no knowledge of the case and would be an impartial juror. Bailey sought to remove Heine for cause. When her motion on this issue was denied, she later exercised a peremptory challenge to remove Heine.

RCr 9.36(1) provides that a juror shall be excused as not qualified if there exist reasonable grounds to believe that the juror cannot render a fair and impartial verdict on the

evidence. The decision of whether to remove a potential juror for cause lies within the sound discretion of the trial court.<sup>2</sup>

In the matter at bar, Heine stated that he had been a police officer for only two years and had never been involved in the type of violent altercation of which Bailey was accused; that he did not work in the same division as the lead detective (Detective Keeling); that he had no involvement with the instant case, nor was he aware of any facts relating to the case; that no one had discussed the case with him; and that his employment would not affect his ability to assess the testimony.

After considering Heine's answers, the trial court opined that Heine was qualified to sit as a juror. A juror is qualified to serve unless there is a showing of bias and it is incumbent upon the party claiming bias to prove the point.<sup>3</sup> However, deference must be given to the trial judge, who sees and hears the juror, in reviewing determinations of impropriety for cause.<sup>4</sup> Law enforcement personnel are not automatically excluded from the jury panel.<sup>5</sup> Giving due deference to the trial court, who heard the juror's statements and viewed his demeanor in response to questions asked by counsel, we do not believe

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<sup>2</sup> Gamble v. Commonwealth, 68 S.W.3d 367 (Ky. 2002).

<sup>3</sup> Polk v. Commonwealth, 574 S.W.2d 335 (Ky.App. 1978).

<sup>4</sup> Wainwright v. Witt, 469 U.S. 412, 428-30, 105 S.Ct. 844, 854-55, 83 L.Ed.2d 841 (1985).

<sup>5</sup> Sholler v. Commonwealth, 969 S.W.2d 706 (Ky. 1998).

there was an abuse of discretion, which is ultimately the dispositive question. Therefore, we affirm the trial court on this issue.

Furthermore, Heine did not sit on the jury that decided the case. Bailey exercised a peremptory strike on him. In Morgan v. Commonwealth,<sup>6</sup> the Kentucky Supreme Court overruled Thomas v. Commonwealth,<sup>7</sup> relied upon by Bailey, for the proposition that it is reversible error to be forced to use a peremptory challenge to eliminate a juror who should have been dismissed for cause. The Morgan case cites the following passage from Dunbar v. Commonwealth,<sup>8</sup> which addresses this issue:

A defendant's right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision. Rigsby v. Commonwealth, 495 S.W.2d 795 (Ky. 1973); Randolph v. Commonwealth, 716 S.W.2d 253 (Ky. 1986); Sanborn v. Commonwealth, 754 S.W.[2]d 534 (Ky. 1988). As long as the jury that actually hears and decides the case is impartial, there is no constitutional violation. Even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury. Cf. Turpin v. Commonwealth, 780 S.W.2d 619 (Ky. 1989); Cf. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).

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<sup>6</sup> \_\_\_ S.W.3d \_\_\_, 2006 WL 140564 (Ky. 2006).

<sup>7</sup> 864 S.W.2d 252 (Ky. 1993).

<sup>8</sup> 809 S.W.2d 852, 854-55 (Ky. 1991).

Bailey next argues that the trial court committed reversible error in failing to instruct the jury on voluntary intoxication. Bailey relies in part on a Kentucky Supreme Court opinion holding that a "voluntary intoxication instruction is justified . . . when there is evidence that the defendant was so drunk that he did not know what he was doing, or when the intoxication [negates] the existence of an element of the offense."<sup>9</sup> Bailey notes that some of the charges against her were "knowing" or "intentional" offenses, thereby entitling her to an instruction on voluntary intoxication.

We find no error on this issue. As the Commonwealth properly notes, no evidence was adduced at trial that Bailey's intoxication removed her ability to form intent. To the contrary, testimony was introduced that Bailey made numerous statements during the commission of her alleged offenses evidencing her intent to commit those offenses. According to the testimony, Bailey made statements including, "Come on, b\*\*\*\*! I'll whoop both your a\*\*\*\*!"; "I'm gonna kill that white b\*\*\*\* and that yellow b\*\*\*\*!"; and "I hope I bit her fingers off and I hope the b\*\*\*\* dies!". Irrespective of this testimony, Bailey does not direct us to any testimony or other evidence before or during the trial to support the assertion that she

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<sup>9</sup> Nichols v. Commonwealth, 142 S.W.3d 683, 688 (Ky. 2004) (quoting Rogers v. Commonwealth, 86 S.W.3d 29, 44 (Ky. 2002)).

lacked the capacity to form the required intent. Accordingly, we must conclude that the trial court acted properly in refusing to instruct the jury on the defense of voluntary intoxication.

Lastly, Bailey maintains that the trial court committed reversible error in failing to instruct the jury in a matter consistent with the presumption of innocence and burden of proof. Specifically, Bailey notes that the trial court gave the jury instructions directing it to find her "guilty . . . if and only if, . . . ." Bailey argues that the jury should have been instructed to find her "not guilty . . . unless . . . ." She argues that this failure deprived her of the due process rights to which she was entitled, and further deprived her of a right to a fair trial.

This argument is not persuasive. Setting aside the Commonwealth's contention that the argument is not preserved for appellate review, Bailey has not shown that the trial court's instructions failed to comply with either RCr 9.56 or Justice Cooper's treatise to which she cites. The instructions properly placed the burden of proof on the Commonwealth, and the trial court did not err in so ruling.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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