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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001145-MR

LANELLE WALKER

APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2007-SC-0100-DG

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CR-001461

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

STUMBO, JUDGE: The case before us is on remand from the Kentucky Supreme Court for reconsideration in light of the recent holding in *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). In *Shane*, the Kentucky Supreme Court overruled

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006), holding that a trial court's failure to strike a juror for cause violated a substantial right, and thus, could never be harmless. *Shane* at 341. One issue in the present case was determined using *Morgan*, thus we re-examine it in light of *Shane*. The other issues on appeal deal with another juror struck for cause and prosecutorial misconduct. Based on the holding in *Shane*, we find that the trial court erred in not striking a juror for cause. We therefore reverse and remand for a new trial. Because we grant a new trial, the other appealed issues need not be discussed.

The issue revolves around a juror who Appellant sought to strike for cause. During *voir dire*, the jury was asked if the fact that a person was arrested indicated guilt. Counsel received a positive response from Juror #1. The juror was further questioned about his response and he stated that if a person were placed in handcuffs, he might consider them guilty. The juror was asked if he thought he could put that aside and he responded that he would like to think so. The trial court declined to remove the juror for cause, so Appellant used a peremptory strike to remove the juror. Under *Morgan*, this settled the issue. If a juror did not serve on the jury, the issue of whether the juror should have been removed for cause was irrelevant. As such, a previous panel of this Court found Appellant's right to an impartial jury had not been violated.

Shane changes this rule and states that forcing a party to use a peremptory challenge to remove a juror when the juror should have been removed for cause is a violation of a substantial right. If the juror should have been

removed for cause, but was not, it is reversible error. We find that Juror #1 should have been removed for cause.

Jurors shall be excused when there is reasonable ground to believe that they cannot render a fair and impartial verdict on the evidence. RCr 9.36(1).

It has long been held that it is the probability of bias or prejudice that is determinative in ruling on a challenge for cause. A party charged with a criminal offense 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. (Citations omitted).

Alexander v. Commonwealth, 862 S.W.2d 856, 864 (Ky. 1993) (Overruled on other grounds). “Composition of the jury is always vital to the defendant in a criminal prosecution and doubt about unfairness is to be resolved in his favor.” *Fugate v. Commonwealth*, 993 S.W.2d 931, 939 (Ky. 1999).

Here, Juror #1 indicated that he believed people who had been arrested were guilty. Later, the same juror stated that if someone was placed in handcuffs, he might consider them guilty, demonstrating a preconceived bias against criminal defendants. The juror was asked if he could put aside his feelings and he responded that he would “like to think so.” However, we see this as simply a use of the “magic question” condemned in *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991).

As in *Shane*:

the defendant was tried by a jury that was obtained by forcing him to forgo a different peremptory strike he was entitled to make. If he had been allowed that strike, he

may well have struck one of the jurors who actually sat on the jury. He came into the trial expecting to be able to remove jurors that made him uncomfortable in any way except in violation of *Batson v. Kentucky*; this was a right given to him by law and rule. Depriving him of that right so taints the equity of the proceedings that *no* jury selected from that venire could result in a fair trial. No jury so obtained can be presumed to be a fair one.

Shane at 340.

For the forgoing reasons, we reverse and remand for a new trial.

CAPERTON, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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