

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001268-MR

KENNETH FRANK KIPP

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NOS. 04-CR-002864, 04-CR-003378, & 05-CR-001483

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,¹ SENIOR JUDGE.
ACREE, JUDGE: Kenneth Frank Kipp (Kipp) appeals from a final judgment of the Jefferson Circuit Court following a jury verdict of guilty on one count each of burglary in the second degree, assault in the third degree, and resisting arrest. Kipp claims the trial court erred in striking a juror for cause, failing to instruct the jury on criminal mischief in the third degree, and failing to instruct the jury in a manner consistent with the

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

presumption of innocence and burden of proof. For the reasons stated below, we affirm the judgment on appeal.

In the early morning of July 23, 2004, Kipp visited his girlfriend, Jerri Ann Trumpy (Trumpy), at the apartment she shared with her mother and several other family members. Trumpy was eight months pregnant. Trumpy had been dating Kipp for seven to eight months and he occasionally stayed with Trumpy at her mother's apartment. Kipp was intoxicated and agitated because he had not been able to reach Trumpy on her cell phone. Trumpy forced Kipp out of the apartment and he left. Kipp returned later to retrieve some of his belongings he had previously left at the apartment. Trumpy allowed him to do so, but an argument ensued and Kipp left with his belongings.

Kipp returned to the apartment again and Trumpy refused to open the door. In response, Kipp started yelling, pounding on the windows, and kicking the locked door of the apartment. Once Kipp gained entry, he verbally assaulted and struck Trumpy on the forehead. Trumpy fell backward against a door.

Trumpy's mother called 911 and Kipp fled the apartment. The police arrived and attempted to locate and apprehend the appellant. Kipp refused to follow the officers' commands and twice fought free from apprehension by pushing, grabbing, and throwing elbows and forearms at the officers. Kipp was eventually taken into custody.

Kipp was indicted on one count of Burglary in the First Degree, two counts of Assault in the Third Degree, and one count of Assault in the Fourth Degree. On May 11, 2005, Kipp was found guilty of Burglary in the Second Degree, Assault in the Third Degree, and Resisting Arrest, and sentenced to a total of twelve years.

At the time of Kipp's conviction on these charges, there were also pending charges against him by two separate indictments: Assault in the Second Degree and Theft by Unlawful Taking and Persistent Felony Offender in the First Degree (PFOI) relative to an unrelated incident. After his conviction and prior to sentencing in the instant case, Kipp chose to withdraw his former pleas of not guilty in the unrelated cases and enter a plea of guilty to amended charges of Assault in the Fourth Degree and PFOI. In exchange for his guilty pleas, the Commonwealth recommended that all sentences in all cases be served concurrently for a total sentence of twelve years. This appeal followed.

Kipp first contends that the trial court erred in striking a juror for cause because it deprived him of his right to trial by a representative jury and his right to due process. The Commonwealth moved to strike Juror No. 96240 for cause after the juror admitted he had been convicted of Assault in the Fourth Degree for slapping his wife. The juror was not specifically

asked whether the conviction might affect his ability to be impartial, but reasoning from the similarity between the offense committed by the juror and the offenses charged against Kipp, the trial court sustained the Commonwealth's motion.

"It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause." *Pennington v. Commonwealth*, 316 S.W.2d 221, 224 (Ky. 1958). The decision whether to remove a juror for cause is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Peters v. Commonwealth*, 505 S.W.2d 764 (Ky. 1974). Unless the action of the trial court is clearly erroneous, we will not reverse it. *Scruggs v. Commonwealth*, 566 S.W.2d 405, 410 (Ky. 1978).

Whether a juror is capable of impartiality must be reviewed by looking at the totality of the circumstances. See *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991). The court below exercised its discretion in concluding from experience and observation that Juror No. 96240's ability to be impartial had been compromised. Under this state of facts, we cannot say that the trial court was clearly erroneous, and therefore will not disturb its decision.

Kipp next argues the trial judge committed reversible error by failing to give the proper jury instruction in the guilt phase. Kipp asserts that he was entitled to an instruction on

criminal mischief because, though not a lesser-included offense, it served as a defense to the burglary charge in that finding guilt of the former would preclude a finding of guilt of the latter. That is not correct.

Kipp relies on *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), in support of his contention that a requested instruction is required to be given when supported to any extent by the testimony, and that this requirement extends not only to lesser-included offenses, but also alternative offenses. However, the Supreme Court in *Hudson v. Commonwealth*, 202 S.W.3d 17, 21 (Ky. 2006), points out that *Sanborn* is a plurality opinion only. As such, "the decision has no stare decisis effect" and "limited precedential value." The fact that the evidence might support a guilty verdict on a separate uncharged offense does not entitle a defendant to an instruction on that offense. We find no error in the trial court's refusal to instruct the jury on the independent charge of criminal mischief. *Hudson*, at 202 S.W.2d at 22 (quoting *Kotila v. Commonwealth*, 114 S.W.3d 226, 242 n. 3 (Ky. 2003), overruled on other grounds by *Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006)).

Lastly, Kipp maintains that the trial court committed reversible error by failing to instruct the jury in a matter consistent with the presumption of innocence and burden of proof. Specifically, Kipp notes that the trial court gave the jury

instructions directing it to find him "guilty . . . if and only if," Kipp argues that the jury should have been instructed to find him "not guilty . . . unless" He argues that this failure deprived him of the due process rights to which he was entitled, and further deprived him of a right to a fair trial. This argument is not persuasive.

The trial court's jury instructions do, in fact, begin as follows:

You shall find the defendant, Kenneth Kipp,
not guilty unless

Subsequent instructions are taken practically verbatim from the authority cited by Kipp, 1 Cooper, *Kentucky Instructions to Juries* (Criminal)(4th ed. 1999). Kipp has not shown that the instruction failed to comply either with this authority or with Kentucky Rule of Criminal Procedure 9.56. 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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