

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001754-MR

JOHN MORRIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 04-CR-002465

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,¹ SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: This appeal is before us upon a jury verdict convicting John Morris of third-degree burglary. He was sentenced to two-years imprisonment. Morris raises three issues. The first relates to a potential juror whom the defense sought to excuse for cause. The other two issues concern the wording of the jury instructions. We affirm.

¹ 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.

On May 30, 2004, at approximately 9:00 p.m., Wanda Brooks and Greg Lydia, observed two men on the roof of the Parrish Implement Company. Both men on the roof had weed eaters in their hands. Wanda called the police.

Among the police officers who responded to the area of the Parrish Implement building were Officer Michael King, Officer William Pearson, and Officer Robert Hensler. Officer King saw the men on the roof and gave chase when they jumped down and ran. King apprehended one of the men, who turned out to be Morris's codefendant, Davon Wade. Officers Pearson and Hensler were in the area where, according to Officer King, the other suspect had run. Officer Hensler began searching the area. He saw the suspect hop a fence. The suspect ignored Officer Hensler's command to stop, and Hensler gave chase. Officers Pearson and Hensler eventually found the suspect hiding under a bush and arrested him. This suspect turned out to be John Morris, the appellant herein.

On August 30, 2004, Morris and Wade were indicted for third-degree burglary, or, alternatively, complicity to same. KRS² 511.040; KRS 502.020. Wade pled guilty to third-degree burglary in exchange for a two-year sentence conditioned upon his promise to testify truthfully against Morris. At trial, Wade said that Morris was with him when he broke into the

² Kentucky Revised Statutes.

Parrish Implement Company. He also claimed that it was Morris's idea to go to the shop.

The jury convicted Morris of third-degree burglary and recommended a sentence of two-years imprisonment. Judgment was entered accordingly. This appeal followed.

First, Morris contends that the trial court abused its discretion by refusing to strike juror No. 116000 for cause.

In the course of voir dire the prosecutor asked if any of the panel members had been the victim of a home break-in or car break-in. Juror 116000 responded that he had been the victim of a home break-in. Morris argues that follow-up questioning of the juror failed to demonstrate that he could set aside this experience and not hold it against the appellant. Morris also alleges that the trial court misunderstood the juror's response to follow-up questioning.

Morris sought to have the juror excused for cause. When the trial court did not excuse the juror for cause, Morris used one of his peremptory challenges to strike the juror. Appellant alleges that this was prejudicial to him under Thomas v. Commonwealth, 864 S.W.2d 252 (Ky. 1993), as he was required to use a peremptory strike to remove the prospective juror.

We believe that the trial court properly exercised its discretion in not striking the juror for cause; however, more importantly, the issue is essentially moot in light of the

Supreme Court's recent decision in Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006), which overruled Thomas. Therein, the Supreme Court held as follows:

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); Sanbom v. Commonwealth, 754 S.W.2d 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); Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).

Id. at 107.

Thus, as the juror in question herein did not participate in the trial, Morris cannot claim that he was denied a fair and impartial jury on that basis alone.

Next, Morris contends that the wording of the jury instructions failed to adequately articulate that the burden of proof was upon the Commonwealth and his entitlement to a presumption of innocence.

Specifically, Morris claims it was error for the trial court to instruct the jury, with each charge, that "you will find the Defendant, guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all

of the following. . . ." Morris claims that the preferable lead-in sentence for the jury instructions should have been "you will find the Defendant not guilty . . . unless you believe from the evidence beyond a reasonable doubt . . ."

We find nothing in the wording of the jury instructions that deprived Morris of his right to be presumed innocent or otherwise relieved the Commonwealth of the burden of proving each crime beyond a reasonable doubt.³ Moreover, the jury in this case was specifically instructed on the presumption of innocence and the Commonwealth's burden of proof as follows:

The law presumes a defendant to be innocent of a crime and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you should find him not guilty.

Accordingly, Morris's claim is without merit.

Finally, Morris contends that the trial court erred in its wording of the no adverse inference instruction in accordance with RCr⁴ 9.54(3). The instruction given by the trial court stated as follows:

³ In fact, the wording of the instructions given follows the form instructions given in 1 W. Cooper, *Kentucky Instructions to Juries (Criminal)* §§ 3.76, 3.77, 4.23, 5.07, 5.20 (4th ed. Anderson 1999).

⁴ Kentucky Rules of Criminal Procedure.

The defendant is not compelled to testify, and the fact that he does not cannot be used as an inference of guilt and shall not prejudice him in any way.

In contrast, Morris's tendered instruction stated as follows:

The fact that John Morris did not testify in this case cannot be used as an inference of guilt and shall not prejudice him in any way.

As conceded by Morris, the instruction given by the trial court follows the specimen instruction found in 1 Cooper, Kentucky Instructions to Juries (Criminal), § 2.04A, p. 72, (4th ed. Anderson 1999). Accordingly, the instruction given by the trial court adequately informed the jury of its duty to draw no adverse inference from Morris' decision not to testify. We discern no error.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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