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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000839-MR

JOHN EDWARDS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 05-CR-00723

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant John Edwards appeals from a Kenton Circuit Court judgment convicting him of Robbery in the First Degree and Assault in the First Degree. A jury found Appellant guilty of the aforementioned offenses and sentenced him to ten years in prison. After a careful review of the record, we affirm the Kenton Circuit Court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 7, 2005, Appellant, Artez Garret, and RaShawn Kelly, entered the home of Shawn Ruff, Phil Northcutt, Antonio Pointer and Michael Johnson. The three men intended to rob Johnson because they had information that he had been selling marijuana.[1]

Appellant and Garret went upstairs while Kelly held Ruff at gunpoint in the family room. Appellant and Garret entered Johnson's room, forced Johnson to the floor and robbed him at gunpoint. One of the men then hit Johnson in the back of the head and told him he would be shot if he looked up. Appellant, Garret and Kelly then rushed out of the house. Ruff moved to shut the door behind them, but as he approached the doorway, Garret turned and shot him in the shoulder.

Danita Jewel was parked in her car across the street and testified that she saw three men run out of the house. She stated one of them turned and shot a man standing in the doorway to the house. She also testified that after the men were in the car, she saw a man run from the house with a baseball bat and bash out the back passenger side window.

Sergeant Dean Jordan was first to arrive on the scene. The victims and Jewell told the officer what had happened and gave a description of the men and their vehicle. After securing the scene, Sergeant Jordan took Northcutt and Johnson to the

[1] The actual events surrounding the robbery serve no relevance to the issues now before this Court. Thus, only a general summary will be provided as background information.

police station for further questioning. However, on the way, Sergeant Jordan was informed that suspects had been apprehended at a nearby school. He drove the victims to the location and both identified the suspects as the three men who committed the crimes.

Ruff, in his interview with the police, said that Pointer, the only African American occupant of the house, told him that he would set up the whole thing because he was angry with Johnson for allegedly using the "N" word on occasion around him. Ruff stated that Johnson had used the "N" word around Pointer, but he did not recall him directing the word at Pointer.

In Appellant's interview with police, he also stated that Pointer knew the robbery was going to happen but that Pointer left before the robbery occurred. At trial, Johnson testified that he was not racist towards African Americans. However, he was impeached when he admitted previously making a statement that he was racist.

At the beginning of the third day of trial, a juror informed the trial court in chambers that he had previously worked with one of the victims, Johnson, at Meijer, a large grocery and general merchandise store. The juror told the trial court that he worked on the opposite side of the store from Johnson and only knew him by association but that they did "high five" each other in the breakroom. The juror stated he did not recognize Johnson until he took the stand to testify against Appellant. The juror said he attempted to turn away from Johnson to avoid Johnson's recognizing him. However, the juror indicated Johnson "acknowledged" him when he took the stand. After questioning the

juror, with counsel present, as to his impartiality, the trial court decided not to strike the juror.

Appellant was found guilty and now appeals to this Court arguing his attorney sufficiently preserved for review the issue of whether the juror should have been struck from the case. Additionally, should we find the issue was not properly reserved, Appellant insists the trial court's failure to strike the juror amounted to palpable error because he was denied his constitutional right to an impartial jury.

I. CLAIM 1: WHETHER DEFENSE COUNSEL PRESERVED ISSUE FOR APPEAL

A. STANDARD OF REVIEW

Generally, the right to object to a juror because of conflicting qualifications is waived if such objection is not made until after the verdict. *Pelfrey v. Commonwealth*, 842 S.W.2d 524, 526 (Ky. 1992). However, under Kentucky Rule of Criminal Procedure (RCr) 9.22, a party sufficiently preserves an issue for appellate review if at the time of the ruling or order of the court, the party makes known to the court the action which that party desires the court to take or any objection to the action of the court.

B. ANALYSIS

Appellant argues his attorney preserved for appeal the issue of whether the juror should have been disqualified. He alleges his attorney raised concern as to the

juror's relationship with Johnson, and the trial court dismissed such concern. However, a careful examination of the conversation between his attorney and the trial court judge does not indicate any such request or objection to the trial court judge's decision to allow the juror to remain in the jury pool.

The conversation took place in chambers between the trial court judge; Appellant's trial court attorney, Lisa Wenzel; defense counsel for Garret, Mary Rafizadeh; defense counsel for Kelly, Bradly Braun; and the juror. The juror was questioned as to his impartiality and was then dismissed from the room. The following transcription details, in part, the discussion after the juror was dismissed.

TRIAL COURT: Does counsel want to be heard?

…

TRIAL COURT: Does anyone have any concerns with [the juror] continuing to serve?

RAFIZADEH: If he is as neutral as he says and he seems to genuinely believe he is, I'm okay with it. But boy let me tell you, it does freak me out because he has a good opinion of Michael David Johnson.

TRIAL COURT: That's not what I read.

. . .

TRIAL COURT: I just got the impression that he's just some tall guy across the store. Of course, if any of us have been in Meijer, we know that the store is

enormous. You may not see anybody who works there except for break.

RAFIZADEH: I will not move to strike him.

TRIAL COURT: Okay. Yeah. He struck me as being sincere and he told us he did not violate his *voir dire* oath because he told us he did not know who the guy was until he saw him physically.

…

TRIAL COURT: Yeah we know and maybe the record should reflect that Meijer, and I don't know what their staffing is, but we know it is an enormous store. A large, large general merchandise and clothing store . . ..

WENZEL: I think the only concern that I would have is that Michael Johnson tried to acknowledge him when he took the stand. That is somewhat concerning to me.

TRIAL COURT: Yeah, and to [the juror's] credit, he said he just kind of turned his shoulder to him. He didn't feel comfortable with that.

WENZEL: Yeah.

TRIAL COURT: Anything else?

TRIAL COURT: We can stand in recess then.

Upon review, we cannot construe Ms. Wenzel's comments to have sufficiently raised an objection to the trial court's decision to allow the juror to sit on the jury. The transcription reveals Ms. Wenzel took no part in the conversation except for her brief statement voicing concern about Johnson and his attempt to acknowledge the juror when he took the stand.

Nonetheless, Ms. Wenzel made a qualified statement by stating she was "somewhat concerned" with Johnson's conduct. We cannot hold this to be sufficient under RCr 9.22 because "somewhat concerned" is not analogous to a statement objecting to the juror's impartiality or asking the court to disqualify the juror from the case. Further, Ms. Wenzel's comment did not pertain to the trial court's decision not to strike the juror, which is the issue Appellant argues was preserved. Rather, it merely referred to her concern with Johnson's attempt to acknowledge the juror.

However, an attorney's objection or exception to a ruling or order of the court need not be formal and explicitly clear. RCr 9.22. Likewise, RCr 9.22 should receive a broad or liberal construction, rather than a narrow or technical construction. *Cane v. Commonwealth*, 556 S.W.2d 902, 907 (Ky. App. 1977).

Yet, even when broadly construed, we do not find Ms. Wenzel's comment a sufficient objection under RCr 9.22 to preserve the issue. In *Howell v. Commonwealth*, 163 S.W.2d 442, 447 (Ky. 2005), the Kentucky Supreme Court held a party must notify the court of the action he or she desires the court to take, and failure by the party to state

the relief sought indicates satisfactory relief was granted. Ms. Wenzel failed to do so; consequently, this issue was not properly preserved.

CLAIM 2: PALPABLE ERROR CLAIM

A. STANDARD OF REVIEW

Under RCr 10.26, a palpable error is one that affects the substantial rights of a party and if not considered by the court, will result in a manifest injustice to that party. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). A palpable error exists if, upon consideration of the entire case, there is a substantial possibility that the outcome would be different had the error not occurred. *Id.* The decision of whether to strike a juror for cause rests solely within the sound discretion of the trial court, and that decision will not be reversed absent a clear abuse of discretion. *Sherroan v. Commonwealth*, 142 S.W.3d 7, 16 (Ky. 2004). The issue of whether to strike a juror is a troubling one, but the trial court's sound discretion must be given great deference. *Fugate v. Commonwealth*, 993 S.W.2d 931, 939 (Ky. 1999). Bias by a juror must be adequately proven by the party alleging it and cannot be presumed. *Hicks v. Commonwealth*, 805 S.W.2d 144, 147 (Ky. App. 1990).

B. ANALYSIS

As an alternative argument, Appellant contends the trial court committed palpable error by allowing the juror to sit on the case. Upon review, we hold the trial court did not commit palpable error and affirm the trial court conviction.

Pursuant to RCr 10.26, a palpable error may be considered on appeal even though it was not sufficiently preserved for review. Further, it is reversible error to allow a biased juror to sit on the jury. *Fugate*, 993 S.W.3d at 939.

In every criminal prosecution, the Sixth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and Section 11 of the Kentucky Constitution, guarantee a defendant the right to an impartial jury. Appellant argues he was denied this right because Johnson was one of two key witnesses for the prosecution. He contends it was manifestly unjust to allow a juror who he now claims had a favorable bias towards Johnson to remain on the case.

Specifically, Appellant refers to the juror's statements to the trial court that during the time he worked with Johnson at Meijer, he never heard Johnson use the word "nigger," or the slang term "nigga." Yet, Johnson was impeached on the witness stand regarding prior racist statements he had made to police. Therefore, despite the juror's confidence in remaining impartial, Appellant insists the juror was unwilling to view Johnson as a liar and a racist because of his past relationship with the victim.

Relying upon *Hicks v. Commonwealth*, 805 S.W.2d 144, 147 (Ky. App. 1990) (citing *Randolph v. Commonwealth*, 716 S.W.2d 253 (Ky. 1986)), Appellant argues that "[e]ven where jurors disclaim any bias and state that they can give the defendant a fair trial, conditions may be such that their connection would probably subconsciously affect their decision in the case." Further, to construct a completely unbiased jury in a criminal prosecution, it is vital that all doubts as to the competency of a

juror be resolved in favor of the defendant. *Id.* Additionally, Appellant argues the decision of whether a juror is biased should be reviewed under the totality of the circumstances, and it is inconsequential that a juror merely states that he or she will be impartial. *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991).

In *Sanders v. Commonwealth*, 801 S.W.2d 665, 670 (Ky. 1990), the defendant was convicted of murder and sentenced to death. On appeal, he argued the trial court committed palpable error by allowing a juror to sit on the case. During *voir dire*, the juror stated he was acquainted with one of the murder victims through his business. The juror said he liked the victim but described their relationship as casual. On appeal, no abuse of discretion was found because the juror clearly indicated he thought he could be fair and impartial.

In *Caldwell v. Commonwealth*, 634 S.W.2d 405, 407 (Ky. 1982), the Court declined to find an abuse of discretion by the trial court when a juror initially appeared to be biased but subsequently answered questions and explained he could set aside any bias and render an impartial verdict. Under the facts, the Court did not hold the trial court's decision to be clearly erroneous and refused to disturb its decision.

In *Dillard v. Commonwealth*, 995 S.W.2d 366, 369 (Ky. 1999), the victim was the captain of the Christian County Fire Department, and the juror was a fireman at the same department, but they worked different shifts. Additionally, the juror knew some of the police officers that testified at trial against the defendant. Despite the potential for

bias, the Kentucky Supreme Court held the trial court did not err in refusing to excuse the juror for cause.

Comparing the potential bias in this case to the previous cases, we cannot hold the juror's association with Johnson was at a level that would prevent the juror from making a fair and impartial decision. Like *Sanders*, the juror's relationship in this case was nothing more than a casual acquaintance in the workplace, or as the juror stated: "We were just like two trains passing at night."

As in *Caldwell*, once the juror's potential bias in this case was discovered, the trial court immediately held a meeting in chambers with counsel for each co-defendant to discuss the juror's impartiality. The trial court judge asked the juror numerous questions regarding the potential for bias towards Johnson, to which the juror clearly responded that he would have no problem making an impartial decision based upon the evidence presented by both parties.

Lastly, there was a far greater likelihood of impartiality in *Dillard* than in this case. Yet, the Kentucky Supreme Court in *Dillard* did not find an abuse of discretion by the trial court's decision not to disqualify the juror. In the case at hand, the juror worked at the same place as the victim, but the victim was not the juror's subordinate. Further, the juror in this case did not also have a close association with the testifying witness.

Therefore, we find Appellant's contention that the trial court committed palpable error when it failed to strike the juror is not well taken. Moreover, the evidence against Appellant was overwhelming, and we do not believe replacing the juror would have affected the verdict. Accordingly, we do not believe this rises to the level of palpable error.

Therefore, for the reasons as stated, we hereby affirm the trial court's judgment of conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

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