

RENDERED: OCTOBER 2, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001712-MR

ROY LEE CASKEY AND
JOHNNY CASKEY

APPELLANTS

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 05-CI-00181

AVENELL C. GOODPASTER,
INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF
ROY CASKEY; VERSIE C. COUCH;
AND CARTER COUCH,
HER HUSBAND

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,¹ SENIOR JUDGE.

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

HENRY, SENIOR JUDGE: This is an appeal from a jury verdict and judgment of the Morgan Circuit Court in a will contest case.

Roy Lee Caskey, Sr. died on February 25, 2005. Under the terms of his will, his entire estate was left to his daughters, Avenell C. Goodpaster and Versie C. Couch. His sons, Roy Lee Caskey and Johnny Caskey, brought suit against their sisters to have the will and some earlier deeds set aside, alleging undue influence and lack of testamentary capacity. The jury returned a verdict in the sisters' favor. On appeal, the Caskey brothers argue that the trial court erred in denying their motions for a mistrial on two issues: (1) the admission of testimony at trial which alluded to Roy Lee Caskey's indictment for the murder of his wife; and (2) alleged juror misconduct when a juror failed to reveal that he was a member of the grand jury which delivered the indictment.

At the outset, it should be noted that the record on appeal does not include either the CDs or videotape of the trial proceedings, although citations to these records are made in the briefs. The designation of the record is also not in the appellate record. In such circumstances, "when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Before trial, the Caskeys filed a motion in limine seeking to prevent Goodpaster and Couch from introducing testimony concerning Roy Lee Caskey's indictment in 1984 for the murder of his wife. (Ultimately, the charges against

Roy Lee were dropped, and he was never tried for the murder.) The trial court granted the Caskeys' motion. In her testimony at trial, however, Avenell Goodpaster referred to an event which occurred "around the time Roy Lee's wife went missing." Counsel for the Caskeys objected and requested a mistrial. A conference was held in the judge's chambers, at which counsel for the plaintiffs and counsel for the defendants both agreed with the court that an admonition to the jury to disregard the specific statement would not be beneficial, because it would only serve to draw the jury's attention to the statement. It was agreed, however, that the court would admonish the witness to make no further reference to the relationship between Roy Lee and his wife. Counsel for the Caskeys renewed the motion for a mistrial at the close of testimony and again after the trial. It was denied on both occasions.

The Caskeys argue that the trial court erred in not granting their motions for a mistrial, because if the judge believed that an admonition to the jury would not be beneficial, then it was unreasonable to assume that the statement had not had any impact on the jury or on their view of Roy Lee Caskey. Even if the statement had an impact on the jury, however, a mistrial was not the automatic remedy. The standard for granting a mistrial is very stringent and is left in great part to the discretion of the trial court:

A motion for mistrial presents not only competing interests but also an unlimited number of varying and unique situations. For these reasons rigid, per se standards have been rejected. In order for a trial judge to grant a mistrial the record must reveal "a manifest

necessity for such an action or an urgent or real necessity”. *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672, 678 (1985) (citations omitted). This test permits a balancing of the competing interests present whenever a motion for a mistrial is advanced. Furthermore, it recognizes that each situation must be analyzed according to the unique facts presented. Although *Skaggs* was a criminal case, its flexible standard is appropriate in civil cases and we so hold.

It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. . . .

Mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed. [Citation omitted.]

Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996).

When reviewed under this standard, Averell Goodpaster’s indirect reference to the disappearance of Roy Lee’s wife was not sufficiently prejudicial to warrant the drastic remedy of a mistrial. There was nothing in her statement that linked Roy Lee to his wife’s disappearance. As the trial court observed, the statement could have been interpreted by jurors to mean that Roy Lee’s wife had left him or run off with another man. The trial court further reasoned that, “even if the use of the word ‘disappeared’ conjures up suspicion of foul play,” Goodpaster’s testimony “did not directly or indirectly identify Roy Lee as the alleged perpetrator. In fact, such statement does not attribute foul play to Roy Lee any more than it attributes foul play to another member of the family, to a

neighbor, or to a stranger.” We agree with the trial court’s reasoning, and hold that it did not abuse its discretion in refusing to grant a mistrial on this ground.

The appellants also argue that the trial court erred in refusing to grant a mistrial on the ground of juror mendacity. During voir dire, several potential jurors stated that they knew the parties in the lawsuit. One juror, Ova May, stated that he had known Roy Lee Caskey “all of my life” and that he was “raised up here with them [the Caskey siblings].” May responded “no” when counsel for the appellants asked him if there was any issue that should preclude him from serving on the jury.

May was subsequently seated on the jury, and was one of nine jurors who voted to uphold the will. After trial, it was discovered that May had not revealed that he sat on the grand jury that indicted Roy Lee Caskey for the murder of his wife. The Caskeys filed a motion for a mistrial, arguing that during the grand jury proceeding May had been exposed to evidence that was highly prejudicial to Roy Lee, including autopsy reports describing in graphic detail the decomposition and mutilation by animals of his wife’s body. The trial court held a hearing on the matter, at which May confirmed that he had served on the grand jury which had indicted Roy Lee. The trial court subsequently denied the motion for a mistrial, as well as a subsequent motion to alter, amend or vacate or for a new trial which also raised the juror misconduct issue.

In order to obtain a new trial on the ground of juror mendacity

a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. . . .

[R]ecent cases have focused not so much on whether the response was true or false in an absolute sense, but rather on the juror's culpability and probable bias. In other words, did the juror deliberately withhold information or intentionally misrepresent factual information?

Com., Transp. Cabinet, Dept. of Highways v. Wilson Furniture, Inc., 205 S.W.3d 267, 269 (Ky. App. 2006) (internal citations and quotation marks omitted).

In its order denying the motion for a mistrial, the trial court analyzed May's responses at some length, assessing whether he had deliberately withheld information during voir dire. The trial court found that he had not, noting that May admitted that he had known Roy Lee his entire life, but that counsel for the appellees did not make any further specific inquiries regarding their relationship. The trial court made detailed findings which we set forth here:

the Court notes that during jury selection, when asked by the Court about the parties, Ova May clearly indicated that he knew Roy Lee Caskey. In fact, Mr. May stated, "I've know'd (sic) him all my life." After the conclusion of the Court's introductory questioning, the Court stated that the questioning was going to be turned over to the attorneys "who may come back and follow-up on some of the questions for those of you who identified that you knew the parties. They may ask you a little bit more in detail about your relationship with the parties or some of the other things I've touched upon." Certainly, this statement by the Court opened the door for counsel to delve deeper into the responses given by the jurors concerning their knowledge of the parties.

However, the Plaintiffs never inquired further as to Mr. May's relationship with Roy Lee Caskey or any of the other parties.

Certainly, in light of the small size of the community and the fact that Mr. May had known Roy Lee Caskey all his life, it would have been more than reasonable to assume that Mr. May knew about Roy Lee Caskey's murder charge (even if he was not on the grand jury that heard such a charge.) The only way to find out the extent of what Mr. May knew was to further question him.

Nothing in the questioning of the jury panel indicates that Ova May wrongfully withheld information from the attorneys or failed to truthfully answer questions regarding his qualifications to serve as a juror. At the Hearing on December 19, 2007, Mr. May indicated that he did not even think about the prior grand jury service in the murder case until sometime after the questioning was complete. However, the Court again notes that no questions were asked which were designed to uncover any knowledge jurors may have had regarding the murder charge and any prior proceedings regarding same. Had Mr. May remembered this additional connection to Roy Lee Caskey sooner, the outcome would have been the same, for Mr. May was never asked to elaborate on his specific knowledge of Roy Lee Caskey.

The issue before the Court is not the fact that Ova May served on the grand jury which examined Roy Lee Caskey's murder charge. Rather, the issue before the Court is that Ova May obviously knew about Roy Lee Caskey's murder charge. In light of the fact that counsel for the Plaintiffs directed no questions regarding this issue to the jurors who acknowledged knowing or knowing of Mr. Caskey, the Court is not persuaded that a mistrial is warranted.

In voir dire, Mr. May was asked whether or not his past with Roy Lee Caskey would affect him in any way. He stated that nothing about that would affect his decision. At the Hearing conducted following the Trial, Mr. May

affirmed that he based his decision on the evidence heard. The Plaintiffs have presented no evidence whatsoever to refute this statement by Mr. May.

We agree with the trial court that there is no indication that May deliberately withheld information or intentionally misrepresented information when he failed to disclose that he had served on the grand jury over twenty years earlier. The appellants thus failed to meet the first prong of the test set forth in *Wilson Furniture*.

The judgment and orders of the Morgan Circuit Court are therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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