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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2014-CA-000977-MR

PATRICIA JACKSON AND
RICHARD JACKSON — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE
ACTION NO. 10-CI-01912

ROLAND WALL, CRNA, AND
ANESTHESIA AND PAIN SPECIALISTS
OF BOWLING GREEN, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: Patricia and Richard Jackson appeal from a jury trial in the Warren Circuit Court. The Jacksons argue that the several jurors in their trial should have been excused for cause, and that they had to exercise peremptory strikes to excuse those jurors. Because we hold that the Jacksons waived any

objection concerning the one juror who sat on the jury, and that their objections concerning the jurors who did not sit on the jury were not preserved, we affirm.

I. Factual and Procedural Background.

This appeal arises from an operation performed on Patricia Jackson at the Medical Center at Bowling Green, Kentucky. Jackson alleges that Ronald Wall, CRNA,[1] an employee of Anesthesia and Pain Specialists of Bowling Green, P.L.C.,[2] incorrectly administered her anesthesia. As a result, she claimed she experienced, among other things, mental distress, depression and post-traumatic stress disorder (PTSD), and brought this action against Wall and his employer.

A trial concerning this incident was held in Warren Circuit Court. During jury selection, the voir dire raised questions concerning five venire members: Sherry Price, Sue Lofton, Anna Sparks, Paul Conrad and Garrett Martin.

Price stated that one of the attorneys for the appellees in this case, David Broderick, had represented her in a divorce action. Price stated that she would "not necessarily" give more weight to Broderick's part of the case. The Jacksons made no motion to strike Price for cause. Price eventually was one of the jurors who decided the case.

Lofton stated that Broderick had represented her "husband and his company in a criminal case." After stating that she would "absolutely not" give Broderick's statements or his witnesses' testimony more weight, she was returned

[1] Certified Registered Nurse Anesthetist.

[2] The Notice of Appeal designates the employer as a P.S.C., whereas the trial court record correctly notes the organization as a P.L.C.

to the venire panel. Later, in response to a different line of questioning, Lofton stated that she was in the insurance industry and that Anesthesia and Pain Specialists was one of her clients. She stated that she would be "very fair" in weighing the evidence, and was again returned to the venire. Later, Lofton stated that she was friends in a business capacity with Keith Norman, a member of Anesthesia and Pain Specialists, and that she had been involved in church activities with his wife. She again said that she believed she could also be fair in regards to this matter. The Jacksons moved to strike Lofton for cause, which the trial court denied. Lofton was returned to the venire a third time.

Sparks was a nurse who worked for Dr. Rodney Miller, one of the original defendants in this case. She stated that finding against Dr. Miller would be "kind of weird" and that it would make her uncomfortable to find against him. When the judge asked Sparks if that relationship would prevent her from making a fair and impartial decision, she stated that she "wouldn't want anybody to worried one way or another" but agreed that she could be fair and impartial. The trial court denied the Jacksons' motion to strike Sparks for cause.

Conrad stated that he did not believe in the existence of either PTSD or depression. He stated that "when you're stressed you could just stop and think about your situation" and that stress did not make sense to him. The Jacksons asked Conrad if he listened to evidence and that PTSD existed would he be willing to make a determination based on what he heard. Conrad responded that he "would be willing to listen to it" but didn't "know if it would change the way [he]

fe[lt] about it." The Jacksons moved to strike Conrad for cause, which the trial court denied. Later, Conrad stated that he believed that most lawsuits around the country were justified, but not "around here." The trial court again declined to excuse Conrad for cause.

Martin also expressed skepticism about the existence of PTSD. When asked whether he would be willing to listen to evidence that PTSD existed and make a determination based on what he heard, Martin said that he could change his mind but that the evidence would "have to be very convincing." He was returned to the venire.

The Jacksons made motions to strike against venire members Lofton, Sparks, Conrad, and Martin, all of which were denied. The Jacksons subsequently peremptorily struck all four from the venire pool. However, no identification was made to the trial court as to which jurors the Jacksons would have exercised their peremptory strikes against if their motions to strike for cause had been granted. The jury eventually found against the Jacksons. This appeal follows.

II. Issue on Appeal.

The sole issue in this appeal is whether the trial court erred when it failed to strike four jurors for cause. The Jacksons concede that they failed to indicate on the strike sheet which jurors they would have used their peremptory strikes on had the trial judge granted their for-cause strikes. The Jacksons assert, however, that this issue is preserved merely because counsel moved to strike four of the jurors in this case for cause. We disagree.

In *Gabbard v. Commonwealth,* 297 S.W.3d 844, 854 (Ky. 2009), the court held that "in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." The court subsequently applied this rule to civil cases in *Grubb v. Norton Hosps., Inc.*, 401 S.W.3d 483, 488 (Ky. 2013). The rationale behind this is as follows:

> The practice of designating jurors on a strike sheet preserves the challenge by indicating before the seating of the jury exactly who the party was unable to strike as a result of the trial court's allegedly erroneous failure to excuse a juror for cause. Then if jurors whom the party wished to use a peremptory challenge against actually serve on the jury, it is clear such a jury is "not the jury [the] party was entitled to select."

Hurt v. Commonwealth, 409 S.W.3d 327, 329 (Ky. 2013) (quoting *Shane v. Commonwealth*, 243 S.W.3d 336, 340 (Ky. 2007)).

Generally, the holding in *Gabbard* has been "strictly applied." *Hurt*, 409 S.W.3d at 330. Our review of the case law provides us with one exception. In *Sluss v. Commonwealth*, 450 S.W.3d 279, 284-85 (Ky. 2014), the court found that counsel substantially complied with *Gabbard* "by stating orally on the record, during a request for additional peremptory challenges, that if he was granted additional challenges he would have struck four additional jurors, which he listed by name." *Sluss*, however, is clearly distinguishable from the facts of this case. The record contains no indication as to who counsel would have struck, orally or

on the strike sheet. Finding this issue to be preserved as the Jacksons' request merely because counsel moved to strike several jurors for cause would effectively eviscerate the court's holding in *Gabbard*. Therefore, we hold that this error is unpreserved and review for palpable error.

CR[3] 61.02 provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion … even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." "[T]he task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court." *Childers Oil Co. v. Adkins*, 256 S.W.3d 19, 27 (Ky. 2008).

The Jacksons exercised peremptory strikes for the four venire members identified on appeal: Lofton, Sparks, Conrad and Martin. No palpable error can exist as to any of those potential jurors, because none of them actually sat on the jury. "Because Appellant has failed to assert that he would have peremptorily struck another prospective juror, this issue was not preserved; and because none of the challenged jurors sat on the jury there is no basis for a finding of palpable error." *McDaniel v. Commonwealth*, 415 S.W.3d 643, 649-50 (Ky. 2013). Therefore, the Jacksons have failed to identify any palpable error in regards to this issue.

[3] Kentucky Rules of Civil Procedure.

The only prospective juror the Jacksons identify on appeal who sat on the jury, Price, was not the subject of a motion to strike for cause below. The Kentucky Supreme Court has held that the failure to make a motion to strike for cause to the trial court waives the right to challenge that juror on appeal. *Caraway v. Commonwealth*, 459 S.W.3d 849, 852 (Ky. 2015). Because the Jacksons waived our review as to Price, we may not consider whether impaneling Price amounted to palpable error. "[E]ven palpable errors may be waived." *Johnson v. Commonwealth*, 180 S.W.3d 494, 503 (Ky. App. 2005).

III. Conclusion.

In sum, we hold that because all of the jurors complained of on appeal by the Jacksons who were the subject of a motion to strike for cause were not ultimately empaneled in this case, the Jacksons are not entitled to relief. The judgment of the Warren Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

BRIEF FOR APPELLANT:

Maureen Sullivan
Louisville, Kentucky

BRIEF FOR APPELLEE:

David Broderick
Brandon T. Murley
Bowling Green, Kentucky