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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000832-MR

LARRY WILLIAMSON APPELLANT

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 14-CR-00083

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Larry Williamson appeals as a matter of right from a final judgment from the Gallatin Circuit Court after a jury trial, arguing trial error involving two jurors entitled him to a new trial. We affirm.

On November 10, 2014, Williamson was indicted on two counts of rape in the second degree, one count of sodomy in the second degree and one count

of sexual abuse in the first degree. The victim was Williamson's stepsister. Previously, the victim lived with her mother and stepfather (who was her uncle, the brother of her father). During the summer of 2014 when the crimes were alleged to have occurred, the victim, who was twelve years old, was living with her stepmother (Williamson's mother) and her father (Williamson's stepfather). During this time, Williamson lived with his wife and grandparents.

Fourteen jurors were selected to hear the evidence, with two alternate jurors to be dismissed before deliberations.

Williamson testified in his defense along with his mother and stepfather. Part of his defense was that he was seldom around the victim in the summer when the crimes were alleged to have been committed.

After deliberations, the jury found Williamson guilty on all counts and recommended he be sentenced to a total of fifteen years.

Williamson timely filed a motion for a new trial. The trial court denied Williamson's motion and entered a final judgment, sentencing him in accordance with the jury's recommendations.

Williamson's first claim of error involves Juror 402. During Williamson's jury trial, following the conclusion of the case but before the closing arguments, Juror 402 stopped the bailiff in the hall and told him she knew that Williamson was lying because she saw him with the victim (thus contradicting

Williamson's defense that he was seldom around the victim). Juror 402 told the bailiff she was unsure if she needed to be excused from the trial.

The trial court questioned Juror 402 in front of counsel. Juror 402 reported she lived in the same apartment complex as the victim's stepfather and mother; she knew Williamson to be the nephew of her neighbor. Juror 402 reported she daily saw Williamson taking a walk from his mother's apartment past the juror's own apartment in the complex with a woman who Juror 402 assumed was Williamson's wife. Juror 402 saw them walk by while the woman was pregnant and, then later, Williamson was with the same woman with a baby in a stroller. Juror 402 reported that sometimes she saw the victim walking with them.

Juror 402 reported she was very familiar with victim's stepfather's and father's family, knew Williamson by sight and knew the victim was placed with her father because her mother and stepfather could not handle her. Juror 402 also heard people talking about why the victim had to leave her father's home. She said she knew a lot about the situation that put the victim with her father.

After questioning Juror 402, the trial court held a conference with the attorneys. Williamson's defense attorney stated that if Juror 402 said in *voir dire* what she had just told the court, he would have asked her to be excused as she knew the history of victim, her mother, her father and her stepfather. He then asked for her to be excused.

The Commonwealth Attorney argued Juror 402's information was not enough to excuse her as she only saw Williamson walking with his wife back and forth to his mother's apartment. However, two different times the Commonwealth Attorney commented that he wished he could call Juror 402 as a witness.

While noting that someone in a small town knowing someone else involved in a trial was not necessarily grounds for excusing a juror, the trial court expressed concern that Juror 402 saw the victim walking with Williamson and, according to the bailiff, Juror 402 knew Williamson was lying about not spending time with victim. The court suggested that since there were two alternate jurors, it would be appropriate to allow Juror 402 finish the trial so that the jury did not think there was anything suspicious and then dismiss her as an alternate. The trial court specifically opined that it could prejudice Williamson if Juror 402 was excused now, stating "it could cut either way." The defense attorney acknowledged that he understood the trial court's reasoning.

The defense attorney expressed concern that Juror 402 could taint the jury and requested the trial court to remind Juror 402 that she was not to discuss anything with the other jurors. The trial court agreed to do so.

Juror 402 was brought back in and the trial court stated it was reminding Juror 402 not to discuss what she knew with the other jurors and not to say anything until the jury was told to deliberate. Juror 402 asked, "What I told

you, can I discuss it in there?" The trial court again told her not to discuss anything with the other jurors until deliberations began. Juror 402 was dismissed as an alternate before jury deliberations began.

Defense counsel did not request a new trial based on Juror 402's being permitted to serve on the jury.

Williamson argues reversible error occurred because of Juror 402's failure to truthfully answer *voir dire* questions and this issue was preserved by trial counsel's request to have Juror 402 removed from the jury or, if unpreserved, should be considered pursuant to palpable error because he did not have an impartial jury. Williamson argues, and the Commonwealth does not dispute, that Juror 402 should have disclosed what she knew of Williamson, the victim and Williamson's mother and stepfather during *voir dire* and, if the juror had been honest, her disclosures would have provided a valid basis to challenge her for cause.

We agree with the Commonwealth that Williamson's claim of error is unpreserved because he received the remedy he requested, that the juror be excused for cause, and he did not ask for a mistrial or file a motion for a new trial. Therefore, we review his unpreserved claim of error for palpable error, which requires a showing that the error resulted in "manifest injustice." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

It is well-settled that pursuant to due process, every criminal defendant is entitled to an unbiased decision by an impartial jury. *Clark v. Commonwealth*, 267 S.W.3d 668, 674 (Ky. 2008). However, "[i]t is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case." *Sanders v. Commonwealth*, 801 S.W.2d 665, 669 (Ky. 1990). To participate in the decision of the case, the juror must participate in the verdict. *Key v. Commonwealth*, 840 S.W.2d 827, 830 (Ky.App. 1992).

When a trial court designates a juror as an alternate during a trial, the trial court is acting properly under Kentucky Rules of Criminal Procedure (RCr) 9.32 as "it sometimes 'become[s] necessary to excuse a juror' other than by agreement or random selection . . . once it becomes evident that the juror is not qualified to sit." *Nunley v. Commonwealth*, 393 S.W.3d 9, 14 (Ky. 2013). *See* RCr 9.36(3) (stating that challenges to a juror after the jury is sworn are prohibited "unless the court for good cause permits it"). Although this practice may be "referred to as designating the juror as the alternate, that is not what it is. . . . Instead, what technically happens when the juror is disqualified, even in the middle of trial, is that he is struck for cause." *Nunley*, 393 S.W.3d at 14.

While Williamson had a due process right to an unbiased decision by an impartial jury, this is just what he received as this right could only be violated if

an unqualified juror participated in the verdict. Once it was learned that Juror 402 failed to appropriately answer *voir dire* questions, the trial court acted properly by deciding to strike Juror 402 for cause by predesignating her as an alternate.

The better practice would have been for the trial court to immediately excuse Juror 402 to prevent any possible taint to the rest of the jury, rather than delay excusing her until the randomly chosen alternate juror was also excused. Jurors are routinely dismissed for illness and family emergencies and it was unlikely the rest of the jury would speculate why Juror 402 was excused. However, Williamson did not object to the trial court's solution and appeared satisfied once the trial court agreed to admonish Juror 402 not to speak of the matter.

At the time the trial court learned of Juror 402's knowledge, the trial was concluded but for closing arguments. Under these circumstances, the brief delay in excusing Juror 402 cannot be shown to have had an adverse effect on the outcome of the trial, much less constitute manifest injustice, as there is absolutely no evidence that Juror 402 shared her "insider knowledge" with anyone else on the jury.

Williamson's other claim of error involves Juror 316. On February 20, 2017, the trial court informed counsel that one of the jurors for Williamson's case, Juror 316, was from the prior venire which served for the previous six-month

jury panel term[1] (June through December 2016). The clerk realized this occurred when preparing juror payments. Juror 316 for the current jury term had been excused from the venire due to his advanced age. The trial court stated that while Juror 316 was duly empaneled previously, he served longer than required.

On February 23, 2017, defense counsel filed a motion for a new trial, arguing Williamson was prejudiced when Juror 316 served in his trial. He argued counsel was not able to properly examine this juror because the juror qualification forms were not available for Juror 316, which deprived Williamson of a fair trial. Defense counsel also argued Williamson was deprived of a unanimous verdict of twelve because as Juror 316 was not qualified and should not be serving, only eleven jurors decided his fate.

The trial court denied Williamson's motion for new trial on the basis that Williamson did not make any objection to Juror 316 before he accepted the panel, he was not deprived of *voir dire* and the purpose of the statutes relating to juries was to prevent juries which were non-random and biased, and the seating of Juror 316 did not implicate these concerns.

[1] We note that while courts and parties typically use "jury term" or "jury panel term" the Administrative Procedures of the Court of Justice, Part II, §1(8) uses the more specific "jury period" and "jury period of service" which are defined as "mean[ing] the time period for which a group of persons is summoned to jury service."

We review the trial court's denial of Williamson's motion for new trial for abuse of discretion. *Kaminski v. Bremner, Inc.*, 281 S.W.3d 298, 304 (Ky.App. 2009).

Williamson argues the inclusion of Juror 316 on the jury panel entitled him to a new trial because his serving was contrary to Kentucky Revised Statutes (KRS) 29A.080(2)(g) and KRS 29A.130, which collectively state that a person may not serve in more than one jury panel term in a twenty-four-month period.

"[B]y statute, certain persons are subject to challenge for cause merely because of their status." *Gibson v. Kentucky Farm Bureau Mut. Ins. Co.*, 328 S.W.3d 195, 200 (Ky.App. 2010). KRS 29A.060(6) states: "Only persons duly qualified . . . shall serve as jurors." Pursuant to KRS 29A.080(2), a juror can be disqualified for many reasons including (g) for having "served on a jury within the time limitations set out under KRS 29A.130." KRS 29A.080(4) states, "[t]here shall be no waiver of these [juror] disqualifications[.]" *See* Administrative Procedures of the Court of Justice, Part II (AP II), §8 (same as KRS 29A.080).

KRS 29A.130 states:

> (1) Except as set out in this section, in any twenty-four (24) month period, a person shall not be required to:
>
> > (a) Serve or attend court for prospective service as a petit juror more than thirty (30) court days

except when necessary to complete service in a particular case; or

(b) Serve on more than one (1) grand jury; or

(c) Serve as both a grand and petit juror.

(2) For the purpose of this section, court includes all federal courts, all other state courts, and any court of the Commonwealth.

See AP II, §13 (same).

We disagree with Williamson's interpretation of these statutes as prohibiting a juror from serving in more than one jury panel term in a twenty-four-month period. Instead, these statutes state that a juror cannot serve for more than thirty court days in a twenty-four-month period and do not address whether a juror can serve those thirty days during multiple jury panel terms or not. While in practice, a juror may not be summoned multiple times for jury terms during that twenty-four-month period or may use having been summoned previously within that time as an excuse to be relieved from jury service, that does not mean it is prohibited.

Although Juror 316 was subject to a six-month jury term in which he could serve up to thirty court days, the length of a jury panel term varies by county and is subject to change, rather than specified by statute or AP II.[2] A jury panel

[2] It appears that the length of a jury term can vary substantially. For example, in Kentucky Court of Justice, *Frequently Asked Questions [About Jury Service]*,

term can be any length, so long as no person has to attend court for prospective service more than thirty court days of that twenty-four-month period. Therefore, there was absolutely no violation of these statutes where Juror 316 continued serving into an additional jury term so long as he did not exceed the thirty days of court service.

As explained in *Smith v. Commonwealth*, 734 S.W.2d 437, 444 (Ky. 1987), "[t]he practice of permitting jurors who appeared for service one term to volunteer in a later term to serve out the remainder of their trial days does not amount to reversible error." As there is no evidence that Juror 316's service exceeded thirty court days, he was not disqualified from serving on Williamson's jury.

Furthermore, even if we assume that Juror 316 did serve more than thirty court days, it appears that this error was waived because Williamson failed to inquire whether any jurors had previous jury service within the past twenty-four months before Juror 316 was selected to serve on his jury.[3]

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https://courts.ky.gov/juryduty/Pages/FAQS.aspx (last visited March 11, 2019), the question "How long will I serve?" is answered as follows: "By law, a person summonsed to jury service is required to be available for 30 court days. However, once a jury begins hearing a case, the jury will remain seated for the duration of that case. In some urban areas a person may be required to serve as few as 14 days, while in some rural areas a person may be asked to serve as many as 150 days. The judge will determine the exact length of jury service."

[3] While Williamson argues he was entitled to raise this error after the jury was seated because *McQueen v. Commonwealth*, 339 S.W.3d 441, 446 (Ky. 2011), has established an equitable

"As a general rule, anything which is good cause for challenge for disqualification of a prospective juror is deemed good cause for a new trial if not known or discoverable to the defendant or his counsel before the verdict and they were misled by a false answer on voir dire." *Combs v. Commonwealth,* 356 S.W.2d 761, 764 (Ky. 1962).

> In circumstances where no challenge is made to juror qualification prior to or during trial and the challenge first occurs after rendition of a verdict, a party seeking relief from the effect of the verdict bears a heavy burden. It is incumbent upon such a party to allege facts, which if proven to be true, are sufficient to undermine the integrity of the verdict. While we are prepared to grant relief in a proper case (*Paenitz v. Commonwealth*, Ky., 820 S.W.2d 480 (1991)), such will not be lightly undertaken and without a substantial basis in fact.

Gordon v. Commonwealth, 916 S.W.2d 176, 179 (Ky. 1995).

While KRS 29A.080(4) states, "[t]here shall be no waiver of these [juror] disqualifications" the Court in *Ohio Cas. Ins. Co. v. Cisneros*, 657 S.W.2d 244, 245 (Ky.App. 1983), opined that this language "is directed to the judge in his activities in drawing up the jury list, and simply provides that he cannot waive any

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caveat to RCr 9.34, we note that RCr 9.34 is an objection to the composition of the panel and not to a particular juror. We believe here the issue was Juror 316's inclusion, rather than an objection to how the panel itself was composed. Therefore, Williamson's claim is more properly governed by RCr 9.36 which addresses challenges to individual jurors and specifies in (3): "All challenges must be made before the jury is sworn. No prospective juror may be challenged after being accepted unless the court for good cause permits it." It is evident that the same basic equitable caveat contained in *McQueen* applies to the disqualification of individual jurors.

of the disqualifications in order to allow a prospective juror to serve." Thus, this provision does not mean that a defendant cannot waive a juror's disqualification under KRS 29A.080(2).

Waiver by a party is established where the party fails to be diligent in asking the jury panel about matters which could disqualify jurors pursuant to KRS 29A.080(2) or bias, or knows or could know of a basis for a disqualification but fails to challenge the juror for cause before the jury is empaneled. When a defendant fails to ask a question during *voir dire* which would reveal a problem with a juror, "he will not be heard to raise it after his conviction and say he could not have discovered [it] . . . in time to have availed himself of the information." *Couch v. Commonwealth*, 255 S.W.2d 478, 480 (Ky. 1953).

> To permit challenges after the verdict is rendered [when a problem with jury qualifications could have been discovered before the jury was empaneled through due diligence] invites a situation in which attorneys may suspect a problem but wait until a case is lost before objecting. Allowing the issue to be raised subsequent to trial also encourages never-ending litigation.

Cisneros, 657 S.W.2d at 245. *Compare Nuchols v. Commonwealth*, 312 Ky. 171, 174-75, 226 S.W.2d 796, 798-99 (1950) (entitlement to new trial where juror lied that he had not served within the past twelve months and his disqualification was not discovered until after trial), *with Pinkston v. Griffith*, 730 S.W.2d 948, 950 (Ky.App. 1987) (no entitlement to new trial based on waiver where juror was

honest on his jury qualification form that he had served within the past twelve months but no objection was made to juror's qualification before the jury was empaneled).[4] *See Anderson v. Commonwealth*, 107 S.W.3d 193, 194-96 (Ky. 2003) (entitlement to new trial where juror marked that he was not a convicted felon on the jury qualification form, but juror's pardon did not restore felon's right to serve on a jury resulting in a disqualification pursuant to KRS 29A.080(2)(e), where juror's felony conviction was only discovered by the defendant after the conclusion of the trial).

While Williamson argues he was deprived of the opportunity to adequately question Juror 316 about his qualifications based upon his missing jury qualification form, the absence of that form just for this juror should have provided a basis for inquiring further into his qualifications and Williamson certainly could have generally inquired of the panel regarding the disqualifications contained in KRS 29A.080(2).

Finally, even if Juror 316 served more than thirty court days in the last twenty-four-month period, Williamson was not entitled to raise such a ground as an objection in the absence of any resulting bias. Unlike the other grounds for

[4] *Nuchols* was interpreting a now defunct jury disqualification statute, KRS 29.040, and *Pinkston* was interpreting a prior version of KRS 29A.080 which stated as a ground for disqualification that a juror "[h]as served on a jury within the past twelve (12) months" and "[t]here shall be no waiver of these disqualifications." *See* 1994 Ky. Acts ch. 416 (H.B. 417) (containing the prior text of KRS 29A.080(2)(h) and retained text of (3) that the Court was interpreting in *Pinkston*).

disqualification, the disqualification for serving too long seems to be one designed to protect the juror from an onerous term of service, rather than simply concerned with preserving the integrity of the jury system.

Pursuant to the interpretation of an earlier version of this statute in *Bowling v. Commonwealth*, 942 S.W.2d 293, 304 (Ky. 1997), *overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.3d 441, 447-48 (Ky. 2011), "KRS 29A.130 merely prevents a person from being forced to serve more than thirty days. KRS 29A.130 provides relief only for the prospective jurors and confers no standing to complain on the appellant." Therefore, even if Juror 316 had served more than thirty court days, it would not be grounds for disqualifying him as a juror where such service did not serve to make him biased.

Accordingly, we affirm the Gallatin Circuit Court's final judgment convicting and sentencing Williamson.

ALL CONCUR.

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