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RENDERED: APRIL 21, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5-12-11 Ella Grant, D.C.

2009-SC-000498-MR

JAMES LEMASTER APPELLANT

V.

ON APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
NO. 08-CR-00038

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

We are again confronted with another trial court's aversion to striking a biased juror for cause. Thus, today we pen another chapter in the same book, once again reiterating that a trial court's failure to strike a biased juror "violates a substantial right accorded great weight in our legal history." *Shane v. Commonwealth*, 243 S.W.3d 336, 343 (Ky. 2007). This substantial right announced in *Shane*, the landmark pronouncement on this matter, affords no leeway for judicial speculation as to a juror's fairness and impartiality.

Appellant, James Lemaster, was convicted in Lawrence Circuit Court of rape, sodomy, kidnapping, unlawful imprisonment, and two counts of wanton endangerment, receiving a cumulative sentence of 70 years in prison. He appeals that verdict, alleging error in evidentiary decisions, jury selection, and the denial of a directed verdict on the sodomy charge. Due to the trial court's refusal to strike a biased juror for cause, we reverse.

I. Background

In the late evening of July 16, 2002, and while defying a restraining order against him, Appellant confronted his ex-girlfriend, Rita Pigg, and her daughter, Regina, the alleged victims in this case, at the trailer where they lived in Lawrence County. According to Appellant, this encounter was an attempt to reconcile with Rita. The trio got in Rita's car and drove to a nearby strip mine, where the remaining events underlying this prosecution ultimately took place. The key factual dispute at trial, however, was whether these events, including Rita and Regina accompanying Appellant in the car, occurred voluntarily or by force.

Both Rita and Regina testified for the Commonwealth. According to their testimony, Appellant forced them into Rita's car by holding a gun to Regina's head. Appellant then drove them thirteen miles to a deserted strip mine, threatening to kill Rita if either moved. Once out of the car, Appellant resumed pointing his gun at Regina and instructed them to walk up the hill. Somewhere up the hill, Regina sat down on a log while Rita and Appellant walked off. There, Appellant ordered Rita to perform oral sex on him. After her initial refusal, Appellant put a gun to her head, after which she succumbed to his demand. Appellant directed Rita to remove her clothing and then he raped her. The pair returned to check on Regina and then went back uphill where Appellant raped Rita again. Ultimately, Appellant agreed to let Rita and Regina go under the condition that they would not discuss what had occurred and upon the condition that Rita would marry him. He then gave Rita five dollars for gas and the she and Regina drove away. Once free, they quickly found a gas station where Rita called the police.

Appellant's version of events was largely similar, except he unequivocally denied any force or threats. He claimed that Rita and Regina voluntarily accompanied him on the drive to the strip mine and then in a walk up the hill. According to him, Regina decided to sit down away from them so Appellant and Rita could have time alone. He then asked Rita if, notwithstanding their break-up and the subsequent restraining order, they could still have sex. According to Appellant, Rita replied that they could and she wanted to. Consequently, according to Appellant, they engaged in consensual sex. They then agreed to meet again, near Rita and Regina's home around 5:00 a.m. Rather than ride back with Rita and Regina, however, Appellant decided to walk thirteen miles home. Later changing his mind, he obtained a ride home from an unidentified driver.

There is no dispute that, after this incident, Appellant immediately went on the run for six years. He claimed that his reason for doing so was unrelated to any allegations of rape, sodomy, kidnapping, wrongful imprisonment, or wanton endangerment, none of which he was concerned about. Instead, he claims that his attempt to escape was based on his violation of the restraining order, for which he feared he would be shot on sight if identified by police. However, he admitted at trial that soon after the incident, he saw news stories about how he was wanted by police for serious felonies other than violating the restraining order.

In 2008, Appellant was caught and charged with two counts of kidnapping, two counts of rape, one count of sodomy, and two counts of wanton endangerment. He was convicted of one count of kidnapping, for which he received twenty years; one count of unlawful imprisonment, for which he received four years; one count of rape, receiving twenty years; one count of sodomy, receiving twenty years; and two counts of wanton endangerment, four years for one, two years for the other. All of his sentences were to be served consecutively for a combined sentence of 70 years. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

He raises four issues on appeal. The first issue pertains to the court's refusal to strike two jurors for cause, who he claims exhibited pro-prosecution bias. Secondly, he contends that the trial court committed reversible error in admitting victim impact testimony from both victims during the guilt phase of the trial. Thirdly, he contends that he was wrongly barred from introducing a prior statement from Rita that her daughter was a liar. And finally, he claims that he was entitled to a directed verdict on the sodomy charge, although he admits this argument might be based on a misunderstanding of the testimony presented at trial.

A. Refusal to Strike a Juror For Cause

Appellant argues that the trial court erred when it failed to strike two jurors, forcing him to use his peremptory challenges to remove them.[1] Specifically, he alleges that Juror W.R. should have been stricken for cause after she expressed an inability to find Appellant not guilty *unless he presented* evidence demonstrating *his innocence.* Appellant preserved this error by moving to excuse the jurors and by exhausting all of his peremptory challenges.[2]

The Commonwealth does not respond to the merits of Appellant's argument, claiming instead that Appellant waived this argument since his trial counsel failed to secure a ruling on the motion to strike. However, in his reply brief, Appellant correctly contends that the trial court, through its own "informal, abbreviated manner," implicitly denied the motion to strike when it directed W.R. to return to the venire pool following examination by the court and counsel at the bench conference. Having extensively reviewed the exchange with the juror, we agree that W.R. should have been stricken when she repeatedly demonstrated her inability to afford Appellant his protections

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1 Finding error and reversing based on the first juror, we do not address Appellant's arguments as to the second juror's impartiality. It is sufficient that we reverse for the first.

2 Appellant concedes that he did not set forth the names of other jurors he would have stricken as is now required. *See Gabbard v. Commonwealth*, 297 S.W.3d 844, 853 (Ky. 2009) (outlining error preservation in this area). However, we did not decide *Gabbard* until October 2009—four months after Appellant's June 2009 trial. Thus, as we stated in *Paully*, "[i]t would be unfair for us to hold [Appellant] to a standard that did not exist at the time of [his] trial[]." *Paulley v. Commonwealth*, 323 S.W.3d 715, 720 (Ky. 2010) Appellant preserved this error via his timely motion to strike for cause.

under the Fifth Amendment to U.S. Constitution and §11 of the Kentucky Constitution.[3] Consequently, we reverse.

During voir dire, defense counsel requested a bench conference, during which he moved to strike four jurors. The court then called each juror forward for individual questioning by both parties before determining whether a strike for cause was appropriate. At the bench conference involving W.R., the following exchange occurred:

> Prosecutor: You understand that the defendant is innocent until proven guilty?
>
> W.R.: Right, I understand that.
>
> Prosecutor: That the burden is upon me to prove the case.
>
> W.R.: Right.
>
> Prosecutor: Do you feel that if I put up, and I have not proven my case, that the defendant has to do anything or put up any evidence, not necessarily object, or be here—
>
> W.R.: Right.
>
> Prosecutor: —but actually, if I don't prove my case does he have to put on anything at all?
>
> W.R.: I just feel like *I need to hear something.* I mean, you know, if he's, to me *if he's going to sit over there and there's not going to be anything said in his defense, I'll have that doubt.* You know what

[3] We recognize that W.R.'s responses are also susceptible to the interpretation that she could not provide Appellant the presumption of innocence. This failure is no less egregious, since the Supreme Court of the United States has long held that the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). Thus, the result would be the same, as a failure to provide the presumption of innocence would violate a litany of protections and mandate reversal. *See* U.S. Const. amend. XI; §11 of the Kentucky Constitution; RCr 9.36(1).

I'm saying. That's what. You know, I know they're innocent until proven guilty *but I have to hear something,* you know, *in his defense.*

Prosecutor: What if [Defense Counsel], after hearing my case, feels that I have not proven my case and he decides to rest on the fact that I have failed to do my job?

W.R.: Well, I don't know. I just, to me, I just, *that doubt would be there.* I mean, you know what I'm saying? I don't want to decide, you know, make a decision that, I don't want to say he's guilty. I want to think he's innocent. *But* if I'm not you know, *if there's not proof, I've got to hear something.* You know what I'm saying?

Trial Judge: Let's say the Commonwealth presents their case and they do the world's sorriest job that ever was, and you wouldn't believe two words of what their witnesses say. Now let's say they close their case and he [Defense Counsel] says they haven't proved nothing. What would you do then?

W.R.: Now, repeat that to me.

Trial Judge: Okay, let's say the Commonwealth puts the sorriest case in the world on, you wouldn't believe the witnesses under—

W.R.: Right.

Trial Judge: —on ten bibles.

W.R.: Right.

Trial Judge: And they close their case. And he says they haven't proved anything. What would you do then?

W.R.: I'd probably have to agree with him [gesturing towards defense counsel], you know, that he's not, you know, *but I just—*

Prosecutor: If I may reverse that, it's my duty to convince you, not his [gesturing towards defense counsel]

W.R.: Right, okay.

Prosecutor: Do you understand that?

W.R.: Right, okay.

Prosecutor: I have to put on the evidence, not him [gesturing towards defense counsel].

W.R.: Right, okay.

Prosecutor: So if I fail to put on that evidence, how do you feel about what he [gesturing towards defense counsel] has to do?

W.R.: Well, I feel okay with what he, you know, if you fail to convince me I'd be alright with what he [gesturing towards defense counsel] decides to do.

Prosecutor: Even if he [defense counsel] just doesn't do nothing.

W.R.: Right.

Prosecutor: Even if he just sits down and says "I quit."

W.R.: Right, you know, I'd agree with [gesturing towards defense counsel], you know.

Prosecutor: He, okay...

W.R.: You know...

Trial Judge: Okay.

W.R.: I just, you know, I just think. That's what my problem, *I just think if he is innocent he would want to defend himself.* You know what I'm saying? I don't want to—[4]

(Emphasis Added). At the conclusion of this exchange, the court inferentially denied[5] Appellant's motion to strike, when it directed W.R. to "go back over there," pointing to the jury box.

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[4] This was W.R.'s last comment of substance.

[5] The difference between the trial court's manner of sustaining and denying these strikes is understood when comparing the court's actions following the first and second juror. After examining the first juror challenged, the court said "bye" and waived the juror out. The video record then shows that juror turning around and walking out of the courtroom.

Initially, we acknowledge that trial courts possess "broad discretion to determine whether a prospective juror should be excused for cause;" and, as such we review these decisions for abuse of discretion. *Mabe v. Commonwealth*, 884 S.W.2d 668, 670 (Ky. 1994); *Gabbard v. Commonwealth*, 297 S.W.3d 844, 853 (Ky. 2009). However, "[w]hen there is reasonable ground to believe that . . . [a] juror cannot render a fair and impartial verdict on the evidence," that juror *shall* be stricken for cause. RCr 9.36(1). As we have previously stated, impartiality is a state of mind; and thus we directed trial courts to "weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). Furthermore, once a juror has shown an inability to be fair and impartial, "no magic question" can rehabilitate him. *Id.* Thus, the failure to "remov[e] a biased juror from the venire, and thereby forc[e] a defendant to forfeit a peremptory strike, makes the defendant take on the duty of the court and prevents him from getting the jury he had a right to choose. This violates a substantial right accorded great weight in our legal history, and can never be harmless error." *Id.* at 343. *See also* RCr 9.24 (otherwise under our harmless error standard we "must disregard any error or defect in the proceeding that *does not affect the substantial rights* of the parties.") (Emphasis added).

Recently, we cautioned that it is "reversible error for a trial court to refuse to excuse for cause a juror who would be prejudiced against the defendant because he did not testify in his own behalf." *Hayes v. Commonwealth*, 175 S.W.3d 574, 584 (Ky. 2005). We further stated that "[a] criminal defendant is entitled to a trial by jurors who will not be prejudiced by the fact that the defendant exercised the Fifth Amendment privilege not to testify."[6] *Id.* at 585. Additionally, we cited, with approval, a case strikingly similar to the present dispute, wherein the Court of Appeals found it reversible error for the trial court to deny a strike for cause after a juror stated he could find the defendant not guilty if he failed to testify *and the Commonwealth failed to prove its case*, "but it would be tough." *Id.* at 584 (citing *Humble v. Commonwealth*, 887 S.W.2d 567, 569-71 (Ky. App. 1994) (emphasis added).

When applying our precedent to the present case, the exchange at the bench between the Commonwealth, the court, and W.R., is a quintessential example of a juror "who would be prejudiced against the defendant because he did not testify in his own behalf." *Hayes*, 175 S.W.3d at 584. W.R. admitted, multiple times, her inability to impartially decide the case in the absence of Appellant's testimony. She repeatedly asserted that she "needed to hear something . . . if he's going to sit over there and there's not going to be

[6]*See Hayes*, 175 S.W.3d 584-85 (collecting cases: "*State v. Cross*, 658 So.2d 683, 687-88 (La.1995) (juror who stated he would not afford defendant the presumption of innocence if he did not take the stand); *State v. Scott*, 482 S.W.2d 727, 732-33 (Mo.1972) (en banc) (juror who said if defendant did not avail himself of his opportunity to testify he would consider that fact and hold it against him); *People v. Bludson*, 97 N.Y.2d 644, 736 N.Y.S.2d 289, 761 N.E.2d 1016, 1018 (2001) (juror who stated that defendant's failure to testify might influence his decision and "make it a little hard for [him] to say that [defendant was] not guilty"); *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237, 240 (1992) (juror who said on one occasion that he could follow the law as given to him by the court but then said that the defendant's failure to testify would "stick in the back of my mind" while he was deliberating). The Supreme Court of Hawaii has held in two cases that post-trial evidence that a juror knowingly concealed during voir dire a bias against defendants who failed to testify or present evidence of their innocence is grounds for a new trial. *State v. Furutani*, 76 Hawaii 172, 873 P.2d 51, 63-64 (1994); *State v. Sugiyama*, 71 Haw. 389, 791 P.2d 1266, 1267 (1990)").

anything said in his defense, I'll have that doubt." Even after walking W.R. through these hypotheticals—situations involving the Commonwealth's total failure to prove its case— W.R. still failed to grasp the Fifth Amendment dictates, and maintained that "if [Appellant] was innocent he would want to defend himself." And as we stated in *Paulley*, we find particularity troubling that W.R.'s "last word on this crucial subject was [her] honest-seeming expression of doubt about her ability to be fair and impartial." 323 S.W.3d at 721 (reversing due to the trial court's failure to strike impartial juror for cause).

Consequently, the trial court erred when it denied Appellant's motion to strike W.R. for cause. As we stated in *Hayes*, "[t]he principle that a defendant's failure to testify in his own behalf cannot be held against him is perhaps the most critical guarantee under our criminal process, and it is vital to the selection of a fair and impartial jury that a juror understand this concept." *Hayes*, 175 S.W.3d at 585 (quoting *People v. Boswell*, 476 N.E.2d 1154, 1157 (1985), rev'd on other grounds, 488 N.E.2d 273 (1986)). Here, at least, one could not say, absent speculation, that W.R. understood or accepted this concept; and thus, we must reverse Appellant's conviction.

B. Other Claims of Error

Though reversing Appellant's conviction, this Court must also briefly consider his other claims of error, two of which we consider because they are likely to recur at retrial (victim impact statements during the guilt phase and his contention that the prior statement by Rita describing Regina as a liar was wrongfully excluded) and the other because it could affect whether he can be retried on one of the charges (his claim that he was entitled to a directed verdict on the sodomy charge).

Both victims testified, over Appellant's objection, to the impact these crimes have had on their lives during the guilt phase.[7] This should not recur on retrial. Victim impact testimony is generally inadmissible at the guilt phase of the trial due to its minimal probative value, in contrast with its inflammatory nature. *Clark v. Commonwealth*, 833 S.W.2d 793, 797 (Ky. 1991); *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (Ky. 1984).[8]

Next, to the extent it could recur on retrial, we address Appellant's contention that he was wrongly barred from introducing Rita's prior statement. The truthful character of a witness "may be attacked . . . by evidence in the form of opinion . . . ." KRE 608(a). Thus, Appellant was free to, and did, elicit Rita's opinion on Regina's character for truthfulness. Appellant, however, asserts his right to introduce a written statement made seven years prior by Rita, where she described her daughter's problem with lying.

This statement was hearsay and not admissible as a prior inconsistent statement. An extrinsic document exhibiting Rita's opinion seven years earlier about Regina's character at that time does not constitute Rita's present opinion

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[7] We disagree with Appellant's contention that the victims' impact testimony severely prejudiced him; however, since we are reversing, we must stop short of analyzing harmless error.

[8] *But see Hilbert v. Commonwealth*, 162 S.W.3d 921, 926 (Ky. 2005) (finding no error when "[d]uring the guilt phase of trial, the mothers of each victim briefly described their sons to the jury. The jury learned such information as the victims' dates of birth, the number and sex of their siblings, and the fact that one victim had a nine-year-old son. One mother softly cried and sniffled as she spoke. Each mother concluded by displaying a single photograph of her son for the jury.")

of Regina's character; it constitutes Rita's previous opinion about Regina's previous character. Because the statement in the document occurred so long ago, it cannot reasonably be construed as being inconsistent with Rita's testimony in court. Such a prior opinion about a witness's prior character is inadmissible under the hearsay rule.

Finally, turning to the sodomy conviction, Appellant contends that he was entitled to a directed verdict on this charge because of the absence of any evidence that Appellant actually sodomized Rita. Appellant's argument arises from confusion as to Rita's exact testimony. Appellant recalls Rita testifying only that Appellant "tried to stick" his penis in her mouth,[9] whereas the Commonwealth correctly quotes Rita as testifying that Appellant "tried *and* stuck it" in her mouth. In his reply brief, Appellant concedes that if he misheard Rita's testimony on this matter, which he did, then this argument has no merit. As such, this Court finds no error in the denial of a directed verdict on sodomy and, therefore, no constitutional bar against retrial on this charge.

III. Conclusion

For the aforementioned reasons, the judgment of the Lawrence Circuit Court is reversed, and we remand for proceedings consistent with this opinion.

All sitting. Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., concur. Cunningham, J., dissents by separate opinion.

[9] In the reply brief, Appellant actually discusses "Regina's testimony" on this matter. As there is no indication elsewhere in the record that Regina testified at all on this matter, this Court assumes that Appellant is referring to Rita's, not Regina's, testimony.

CUNNINGHAM, J., DISSENTING: I respectfully dissent. The majority reverses this case primarily on the questions and answers given during the voir dire of Juror W.R.

In *Shane*, this Court leveled the playing field by not forcing the defendant to give up a peremptory strike to get an ineligible juror off the panel. However, in doing so, we enhanced the consequences of a court failing to properly excuse a juror for cause. Therefore, we should more closely scrutinize juror questioning so as to be especially careful that we do not reverse serious criminal cases, such as this one, because of imperfect answers given by prospective jurors.

In doing this evaluation post-*Shane*, I believe it behooves us as the reviewing Court to establish two levels of scrutiny concerning questions which are proposed to prospective veniremen during voir dire. Greater deference should be given to trial judges and jurors when the voir dire deals with questions of law. Much less leeway should be allowed in juror responses when the questions and answers go to questions of fact. The latter strikes right to the core of due process and the whole purpose of voir dire—to get fair and impartial jurors who can weigh the evidence, follow the law, and render a fair and impartial verdict. All too often, our voir dire in criminal cases places more emphasis on form rather than substance. This case is graphically illustrative of this point.

When read carefully, the exchange between the lawyers, the court, and juror W.R. represents a far too typical exposé of juror interrogation. With rare exceptions, jurors are lay persons who are pulled out of their normal lives, thrust into a court room, and then interrogated in riddles. Who of us—had we not been trained in the legal gymnastics of trial practice—could have given any better answers than Juror W.R.? They deal solely in a question of law before the juror is even given any guidance or instruction by the court as to these principles.

Juror W.R. is asked by the defense counsel if he has to prove something in order for the defendant to be found not guilty. This would follow the normal logic of things, except in our courts a defendant is not required to prove anything. Juror W.R. was never advised accordingly and had no way of knowing this was her duty. Yet, upon further questioning by the prosecutor and the judge, Juror W.R. finally says:

> Prosecutor: So if I fail to put on that evidence, how do you feel about what he (gesturing towards defense counsel) has to do?
>
> W.R.: Well, I feel okay with what he, you know, if you fail to convince me I'd be alright with what he (gesturing towards defense counsel) decides to do.
>
> Prosecutor: Even if he (defense counsel) just doesn't do nothing.
>
> W.R.: Right.
>
> Prosecutor: Even if he just sits down and says "I quit."
>
> W.R.: Right, you know, I'd agree with (gesturing towards defense counsel), you know.

Juror W.R. gets it. She gets it in her own lay person's words, even though no one assisted this poor lady in understanding that an instruction would be given for her to cast aside any pre-conceived notions she may have about a person facing prison needing to do something to defend himself. Contrary to the writing of the majority, we are not "confronted with another trial court's aversion to striking a biased juror for cause." This juror is not so much biased as she was unknowing. And an unknowing juror is not a bad thing.

After reviewing the video of this exchange, I am fully confident that if Juror W.R. had been afforded the opportunity to serve, she would have been a very conscientious juror and would have scrupulously followed the judge's instructions.

That second level of scrutiny—which should be extremely high—deals with what I call questions of fact. Such questions are whether a juror knows something about the case, his or her previous experiences, knowledge of the parties, and other such things which would strike at the heart of whether that juror could be fair and follow the dictates of the law.

There is such an example in this very case of a prospective juror who was not even challenged for cause, ostensibly—I suppose— because she gave all the "right" follow-up "right answers." This was a violent sex case of the defendant against a female victim—sodomy and kidnapping along with other offenses. One of the prospective jurors reported to the court that she had been raped when she was seventeen years old. While some judges may differ, that would serve in my mind as an automatic exclusion. How one could, as the trial court asked of the juror, "cast that experience aside" is beyond my notion of reality. Yet she was not challenged for cause, although she did not serve on the jury. Had she been challenged for cause, I would have placed a much stricter treatment of that failure to strike than I would have in the case of Juror W.R. who was simply giving equivocal answers concerning the law.

If we do not apply these two different levels of scrutiny to the evaluation of motions to strike jurors, we are doing our justice system a disservice. I would affirm the conviction; therefore, I respectfully dissent.

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