

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000322-MR

VICTOR LONG

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 07-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Upon a jury verdict Victor Long was convicted of attempted murder, resisting arrest and second degree fleeing and evading the police. He argues that he was denied a fair trial when the trial court refused to allow the admission of polygraph evidence; that he was entitled to a directed

¹ Senior Judge Joseph E. Lambert 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.

verdict of acquittal; that the trial court pressured the jury to reach a verdict and that he was denied an opportunity to present his defense. Upon review, we discover no reversible error and affirm.

Long and his two sisters owned property in the rural northwestern part of Hart County. Although originally a weekend retreat for the Long family, Victor Long began living there full time in 2004. Over time, a series of long standing disagreements ripened between Long and a neighboring family, the Philpotts. Long believed the Philpott family wanted him to leave the property so that they could use it as their own. A log cabin on Long's property burned to the ground in 2002. Long suspected the Philpott's of arson. A neighbor found a receipt with Robin Philpott's name on it near the burned cabin and turned it over to the police believing it was some evidence of the Philpott's involvement with the fire.

Later, Long's vehicle was shot at, the windows were shot out, and bullet holes were found in the vehicle's body. A trailer was damaged and its windows were also shot out. Additional bullet holes were discovered in an old abandoned vehicle on the Long property. Boards were broken from an outbuilding on Long's property and a padlock was broken off. Long's Suburban SUV had the windows smashed, his motorcycle was apparently run over by a truck and destroyed, while gates and fence posts with no trespassing signs were repeatedly torn down. Someone put a padlock on Long's gate preventing him from entering his property.

A neighbor provided a picture of Robin Philpott tearing down a no trespassing sign on Long's property. That neighbor also suffered a series of acts of vandalism to her property. Long believed all of the trouble in the area could be attributed to the Philpott family. Although he reported the incidents to the police, he was never satisfied that the police conducted an actual investigation.

On August 24, 2008, Robin Philpott called the police and reported that Long had been firing a gun throughout the evening. Trooper White went to the Long property to investigate. As he entered the Long property, he came to a locked gate. The Trooper was backing his vehicle out when he heard a noise in the nearby brush. He turned on his emergency lights and exited the vehicle announcing that he was a trooper with the Kentucky State Police. He called out Victor Long's name several times and walked into the area illuminated by the vehicle's lights so Long could see him and verify that he was indeed a state police trooper. The trooper then walked around the locked gate toward the edge of the woods when a shot was fired that struck the ground approximately 10 feet in front of him.

The trooper took cover and a voice from the woods, later identified by the trooper as Long's voice, called out asking "who is it" and "what do you want". The trooper called for the person to put down the gun and come out into the open but there was no response. The trooper called for backup and awaited the arrival of other officers. He used the loudspeaker in his vehicle calling for Long to come out of the woods but there was no response.

After other officers arrived, the area was searched but ultimately called off around 11:00 p.m. The next evening, Trooper White and two other officers went to Long's property with an arrest warrant. As they entered the property, the trooper saw Long standing in front of a vehicle. Long started to run away but then stopped and returned toward the officers. White believed Long may have been armed and ordered him to the ground. The officers testified that Long did not comply. Long was then struck by the officers and kicked to the ground. After his arrest he was ultimately treated at the hospital for injuries to his head and for broken ribs. Several days later, Trooper White returned to the Long property to take photographs of the area. He discovered a rusted .22 caliber rifle near the area where Long was arrested.

During the investigation, Long submitted to a polygraph test conducted by a private firm and then submitted to a second test conducted by the Kentucky State Police. At trial, the Commonwealth objected to the introduction of any polygraph testing or results and the trial court excluded that testimony. After the Commonwealth rested its case in chief, Long sought a directed verdict of acquittal. The motion was denied. In his defense, Long attempted to introduce the testimony of three law enforcement officers in an "attempt to prove that law enforcement had turned their backs on him and were biased against him." The trial court refused to allow any such testimony stating it went to a collateral issue and was irrelevant. One of the Philpotts did testify and admitted to numerous acts of trespass and vandalism.

Upon submission of the case, the jury began deliberations at approximately 9:00 p.m. At approximately 11:30 p.m. the jury informed the trial court that it was unable to reach a verdict regarding the attempted murder of Trooper White. The trial court read an *Allen* charge to the jury and a verdict of guilty was returned at approximately 1:00 a.m. Long appealed.

Long first argues that the trial court abused its discretion when it refused to allow information regarding the polygraph tests into evidence. The trial court conducted a hearing to determine the scientific reliability of the proposed polygraph evidence and found it to be unreliable and an invasion of the province of the jury. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). It has long been held that any reference to a polygraph examination is error. *Davis v. Commonwealth*, 795 S.W.2d 942 (Ky. 1990). Kentucky courts have held that the results of a polygraph examination are scientifically unreliable and inadmissible as evidence. *Morgan v. Commonwealth*, 667 S.W.2d 704 (1991).

Long relies on the single instance where a criminal defendant was permitted to introduce a reference to a polygraph examination. In *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002), the Court allowed a defendant to explain that he confessed to police only after the officers indicated that he had failed a polygraph examination. “[A] defendant—and only the defendant—has the right, as a matter of trial strategy, to bring evidence of a polygraph examination before the jury to inform the jury as to the circumstances in which a confession

was made.” *Id.* at 40. This very limited use of polygraph evidence has no bearing on Long’s situation. Long did not seek to introduce the polygraph evidence to explain the circumstances of a confession, but rather to rely on the actual results. There was no error in denying that opportunity.

Next Long argues he was entitled to a directed verdict of acquittal. The standard of our review to determine whether a trial court properly overruled a motion for a directed verdict is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Although Long attempted to discredit the Commonwealth’s evidence, when viewed in a light most favorable to the prosecution, it is clear that there was sufficient evidence for the jury to find guilt beyond a reasonable doubt. There was no error.

Although not preserved, Long asks us to review his contention that the trial judge pressured the jury to reach a verdict pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. “The test for determining if an error is palpable, under this rule, is whether it is substantive and obvious or otherwise seriously affects the fairness, integrity, or public reputation of the judicial proceeding.” *Commonwealth v. Mixon*, 827 S.W.2d 689, 693 (Ky. 1992).

When the jury notified the trial court that it was having difficulty reaching a verdict as related to the attempted murder charge, the trial court determined “further deliberations may be useful[.]” RCr 9.57. The trial court then

instructed the jury pursuant to RCr 9.57. There was no error in that regard.

“[S]tatements which merely impress upon the jury the propriety and importance of coming to an agreement do not rise to the level of reversible error.” *Mitchell v. Commonwealth*, 943 S.W.2d 625, 628 (Ky. 1997). Here the trial court asked if the jurors wished to continue. There was no coercion.

Finally, Long argues that he was denied an opportunity to present a defense when the trial court prevented him from calling four different witnesses. He wanted to call a captain and a police officer to show their refusal to “thoroughly investigate the matter” and their refusal to consider new evidence. Long also requested that the police conduct another polygraph examination and examine the situation where he had sustained injuries when arrested. He claims their refusal to do so showed their bias and he was entitled to call them as witnesses to display that bias to the jury. The trial court determined the proposed testimony was irrelevant and collateral.

We have discussed polygraph evidence and can find no fault with the trial court’s decision to refuse any polygraph information. Although Long insists he would have referred to any new polygraph testing simply as “new evidence” we agree with the trial court that such testimony was improper. Regarding his injuries, an internal affairs investigation was conducted but it was not resolved to Long’s satisfaction so he requested another. The refusal to conduct another investigation can hardly be evidence of the police bias; Long simply wanted a result that favored him. None of the testimony spoke to whether or not Long committed the crimes of

which he was accused. It was not relevant to a determination of those issues and was therefore inadmissible. Kentucky Rules of Evidence (KRE) 402.

Long additionally sought the testimony of the police arson investigator who, Long argued, failed to investigate the burning of the cabin. Again, he argues that this tended to show the bias of the police against him. We agree with the trial court that the arson, if that is what actually happened, involved a collateral matter and was not relevant to the issues at trial. Long was able to testify concerning his belief that the police had abandoned him and were biased against him as it related to his claims that the Philpott family had caused problems in the area. He was not denied an opportunity to present those issues to the jury.

Appellant theorized that Michael Gibson, an eighteen-year-old member of the Philpott family, was the actual shooter. On cross-examination of Gibson, Appellant attempted to show that Gibson had been involved in a similar shooting incident, shooting at Long himself. The trial court disallowed the evidence on grounds that it was irrelevant to the case against Long.

We discern no abuse of trial court discretion in disallowing this evidence. Whether Gibson had shot at Appellant had no bearing on whether Appellant shot at Trooper White. From the evidence heard by the jury, there was no need for additional context. The jury could have had no doubt of the bad blood between Appellant and the Philpotts. There was no error in excluding the Gibson shooting evidence.

We affirm the judgment and sentence of the Hart Circuit Court.

ALL CONCUR.

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