

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000511-MR

ADAM PHIPPS

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 06-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,¹ SENIOR JUDGE.

WHITE, SENIOR JUDGE: Adam Phipps appeals from his Adair Circuit Court convictions for first-degree assault, third-degree criminal mischief, and operating a motor vehicle under the influence of alcohol. Phipps claims his convictions must be reversed due to the following errors in his trial: (1) a juror omitted relevant

¹ Senior Judge Edwin M. White 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.

information in voir dire; (2) the court refused to admit relevant evidence; (3) the court admitted an unauthenticated blood test; and (4) the jury rendered inconsistent verdicts.

In 2006, Phipps lived in Breeding, Kentucky, with his roommate and close friend, Derrick Cowan. On April 15, 2006, Phipps and Cowan argued after Phipps suspected that Cowan stole money from him and used the money to buy crack cocaine. During the afternoon, however, the friends settled their differences and started to drink. After running out of alcohol, they drove Phipps's car to a local liquor store and purchased two "fifths" of whisky.²

Cowan and Phipps decided that they wanted to go to a party at Stacy Grant's house. After drinking both bottles of whisky, however, they were too drunk to drive the distance to party. Instead, they drove a shorter distance to Tasha Miller's house and asked her to drive them to the party. Miller was Cowan's girlfriend and, at the time, was five months' pregnant with his child. She agreed and took them to Grant's house.

After they arrived, Phipps and Cowan started to argue again. Soon the argument led to a physical altercation in the yard. Cowan stripped off his clothes. Wearing only his underwear, Cowan started throwing rocks at Phipps. Phipps got into his car and sped away. He lost control of his car and struck a tree. Despite the collision, Phipps turned the car around and drove past Grant's house.

² A "fifth" of liquor is approximately 25 fluid ounces.

Once again, he lost control of the car and struck several mailboxes. Phipps stopped the car and walked back to the yard where Cowan and the other partygoers were still assembled. Cowan and Phipps briefly resumed their argument. Then Phipps got back in the car, drove toward Grant's house and ran over a fence. Miller was among the partygoers who remained in the yard. She attempted to run from Phipps's on coming car, but Phipps drove toward Miller and struck her with his car.

Miller sustained significant injuries from the collision, including: a broken ankle, a broken knee, and two pelvis fractures. She was air-lifted to the University of Louisville Hospital for treatment and was placed on bed rest for several months.

Police officers responded to the scene where they interviewed eyewitnesses and found pieces of Phipps's car. Police went to Phipps home where they saw him get out of his car and go inside. Phipps used slurred speech and smelled of alcohol. He failed a sobriety test and was taken to the hospital for a blood test. Phipps was arrested and charge with first-degree assault, first-degree criminal mischief, and operating a motor vehicle under the influence of alcohol. We shall discuss additional facts herein as they relate to Phipps's arguments.

First, Phipps claims that Danny Grant was improperly impaneled as a juror in his case after Juror Grant failed to inform the court that he was related to law enforcement officers. In voir dire the prosecutor asked, "Are any of you related by blood or marriage to any officer of the law, sheriff, deputy sheriff,

anyone that works for the Commonwealth of Kentucky?” Juror Grant did not respond. In the 1960s, however, Juror Grant’s father was the chief of police in Columbia, Kentucky. His father died prior to Phipps’s trial. In addition, his second cousin’s husband is a deputy sheriff.

On January 27, 2009, the trial court heard Phipps’s post-conviction motion for a new trial based upon Juror Grant’s omissions. Juror Grant claimed that he did not intentionally conceal the information. Instead, Juror Grant claimed that he did not realize that the question required him to inform the court of those relatives and their positions. The trial court found that Juror Grant was not obligated to inform the court about his father’s law enforcement service based upon how the voir dire question was worded. Further, the court found that the law enforcement position held by Juror Grant’s second cousin’s husband was too far removed to be relevant.

In *Adkins v. Commonwealth*, 96 S.W.3d 779, 796 (Ky. 2003), the Kentucky Supreme Court established a two-prong test to determine whether a defendant is entitled to a new trial based upon a jurors statement or lack thereof in voir dire. Under *Adkins*, we must determine a juror failed to honestly answer a material question. *Id.* Second, we must determine whether a truthful answer would have created a basis to challenge the juror’s empanelment for cause. *Id.*

While Juror Grant’s father’s position may have been relevant to jury selection, the jury pool was not asked whether they were related to anyone, alive or

deceased, who was ever employed as a law enforcement officer. Instead, the question was asked in the present tense.

We confronted similar facts in *Whisman v. Commonwealth*, 667 S.W.2d 394 (Ky. App. 1984). In *Whisman*, the jury pool was asked if they had relatives or friends who were police officers. One of the jurors had a son who was killed while on duty as a police officer. The juror did not reveal her late son's job or the situation surrounding his death. Our Court concluded:

The appellant insists that we construe Mr. Hay's failure to reveal such a fact as a hidden bias in favor of the prosecution. We have no latitude to give such a construction. The juror was under no duty to make such a revelation about his son since he was not asked. His answers were all truthful in response to the questions propounded. We cannot suspect a violation of the juror's oath based on a question and answer not asked or answered. Bias or prejudice of a juror is not presumed; actually, the converse is true unless there is some basis to the contrary in the record.

Id. at 398.

As in *Whisman*, we decline to find untruth or bias in Juror Grant's failure to reveal his late father's previous position. Therefore, we decline to find error in the trial court's refusal to grant Phipps a new trial based upon Juror Grant's omissions.

Further, we conclude that Juror Grant's second cousin's husband's position as a deputy sheriff does not alone warrant for a new trial. The prosecutor questioned whether any juror was related by marriage to a law enforcement member without specifically noting a degree of kinship. Even if Juror Grant had a

close relationship with his second cousin or her husband, Phipps failed to present evidence that Juror Grant could not be fair based upon these relationships.

Therefore, we conclude that the trial court did not err by refusing Phipps's motion for a new trial based upon Juror Grant's omissions.

Second, Phipps argues that he was entitled to cross-examine Miller concerning her drug use the day before the crime. Phipps argues that the drug use relates to Miller's credibility and ability to accurately remember the details of the crime.

While the Confrontation Clause provides criminal defendants the right to cross-examine witnesses, it does not allow defendants to cross-examine witnesses on any topic or in any manner they chose. *Davenport v. Commonwealth*, 177 S.W.3d 763, 767-68 (Ky. 2005). "In determining the scope of cross-examination on collateral issues, the court must first determine if the proposed cross-examination is relevant pursuant to [Kentucky Rules of Evidence (KRE)] 402. The trial court must then balance the probative value of the evidence against its prejudicial effect. KRE 403." *Id.* at 772.

Phipps generically argues that Miller's drug use may have affected her ability to accurately remember the events of the crime. However, Phipps failed to present any evidence to indicate that Miller was still under the effects of narcotics at the time of the crime. Further, our review does not indicate that Miller's testimony concerning the crime and its surrounding events was inconsistent with the testimonies of other witnesses. Miller's drug use, which occurred when she

was five months' pregnant, would clearly have a prejudicial effect without adding any probative value. Therefore, we find no error in the court's decision to exclude this line of questioning.

Third, Phipps claims that his blood test was improperly admitted because there was insufficient testimony presented to show that it was properly collected under 500 Kentucky Administrative Regulations (KAR) 8:030 §2. Phipps argues that the blood test collected was tainted and could not be properly authenticated.

Our review indicates that Phipps did not properly preserve these chain of custody and authentication issues. Although he claims that the test was not properly authenticated, he failed to object to the testimony and evidence that laid a proper foundation for its admission. Phipps agreed to release the nurse who drew the blood from her subpoena after a police officer testified that he observed Phipps's blood drawn. Phipps did not object to the admission of the forensic scientist's report who analyzed the blood. The release of the nurse and Phipps's failure to object to the forensic scientists report was relevant to the ultimate admission of the document.

Nonetheless, absolute compliance with the administrative regulations is not required for the admission of blood tests, as long as substantial compliance existed. *Matthews v. Commonwealth*, 44 S.W.3d 361, 364 (Ky. 2001). Substantial compliance with the regulations was found in the police officer's testimony

concerning how the blood was drawn and procedures used to identify the blood sample.

Nonetheless, if the admission was erroneous, we conclude that blood test admission was harmless in light of the overwhelming evidence of Phipps's intoxication. In addition to eyewitness testimony, the police officer's testimony and the forensic scientist report provide a strong basis for the conclusion.

Finally, Phipps argues that the jury rendered inconsistent verdicts by finding him guilty of first-degree assault without finding him guilty of the substantial injury aggravator related to his conviction of operating a motor vehicle under the influence of alcohol. Kentucky law, however, does not require rigid consistency.

[R]igid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury, particularly with regard to lenity. Such an approach would unduly restrict the right of the jury to consider the evidence broadly and convict or acquit based upon its view of the evidence pertaining to each charge.

Commonwealth v. Harrell, 3 S.W.3d 349, 351 (Ky. 1999) (internal citations omitted).

Pursuant to KRS 508.010(1),

A person is guilty of assault in the first degree when . . . [h]e intentionally causes serious physical injury to another person by means of a deadly weapon or dangerous instrument; or [u]nder circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

Miller's extensive injuries clearly met the serious physical injury element required by Phipps's first-degree assault conviction.

Unlike the charge of first-degree assault, there is no requirement of serious physical injury for an operating a motor vehicle while under the influence of alcohol conviction. KRS 189A.010. Under KRS 189A.010(11)(c), however, serious physical injury acts as an aggravator to enhance the penalty. Because this charge does not contain a serious physical injury element but merely an aggravator, we conclude that there was no inconsistency.

Accordingly, we affirm Phipps's Adair Circuit Court convictions.

ALL CONCUR.

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