

RENDERED: SEPTEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000177-MR

DAVID A. DAUGHERTY

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 09-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,¹
SENIOR JUDGE.

CLAYTON, JUDGE: This is a direct appeal from a jury verdict finding the
appellant guilty of manslaughter in the second degree. For the reasons that follow,
we affirm the rulings by the trial court.

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.

FACTUAL BACKGROUND

Appellant, David A. Daugherty, was convicted of second-degree manslaughter by a Madison Circuit Court jury on November 18, 2009. The charges stemmed from the shooting of Christopher Shane Adkins. Daugherty contended that he shot at Adkins because the latter smashed the window of his car with a baseball bat and then reached toward his waist as though he was going for a weapon. Daugherty testified that he did not mean to kill Adkins, just to wound him.

Daugherty appeals the jury verdict arguing that the trial court denied him the right to present a defense when it excluded relevant evidence of Adkins's methamphetamine use and that the trial court violated his Sixth Amendment Right to confront witnesses when it allowed statements and reports to be read into the record.

STANDARD OF REVIEW

We review rulings of the trial court on evidentiary issues on an abuse of discretion standard. *Olden v. Com.*, 203 S.W.3d 672, 677-678 (Ky. 2006).

DISCUSSION

Daugherty first contends that the trial court should have allowed into evidence Adkin's methamphetamine use. Dr. Cristina Rolf, the Madison County

medical examiner, was a witness at the trial. During her cross-examination by Daugherty's counsel, she was asked whether the toxicology report showed Adkins had methamphetamine in his system at the time of his death. Upon objection by the Commonwealth, the trial court ruled that Daugherty would have to lay a foundation both that Adkins was on methamphetamine when Daugherty shot him and that it affected his behavior. Daugherty's counsel then withdrew the question. We find the trial court did not err in so ruling.

Daugherty, however, contends that this ruling undermined his defense. We disagree. The trial court required a foundation in order to allow the jury to establish a connection between Adkins's methamphetamine use and Daugherty's fear that his life was in danger. Daugherty is correct that evidence is admissible if it is considered "relevant to a full understanding of the circumstances[.]" *Greene v. Com.*, 244 S.W.3d 128, 137 (Ky. App. 2008). The trial court had to weigh the relevance, however, with the prejudicial nature of the jury concluding that the victim was an illegal drug user. Thus, the trial court did not abuse its discretion in requiring a foundation be laid prior to questioning regarding Adkins's possible methamphetamine use at the time of his death.

Next, Daugherty contends that the trial court violated his right to confront witnesses under the Sixth Amendment when it allowed statements and reports into evidence without requiring the preparers of such to be present and subject to cross-examination. The first article complained of is the ballistics report. Detective Steven King testified that the ballistics examiner from the

Kentucky State Police Lab had analyzed the ballistics of the scene, but was not available to testify as to those results.

The second is the statement of Ricky Witt taken by the police when questioning him about the shooting. Daugherty argues that Witt's statements were testimonial and, therefore, should not have been read to the jury. Daugherty's counsel filed a petition for writ of *habeas corpus ad testificandum* on November 10, 2009, since Witt was in the Fayette County Detention Center. The trial court granted the petition, but the record is unclear as to why Witt did not appear at trial.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused to confront and cross-examine witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1110, 39 L.Ed. 347 (1974). This allows the accused to fully explore the credibility of the witness, challenge the witness's testimony and expose any reasons the witness may have for giving false statements. *Id.* The Commonwealth argues that Daugherty waived his rights regarding this issue by failing to object to the testimony of Detective King. Daugherty admits it was not preserved, however, he contends that it is palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26 and, therefore, may be reviewed minus preservation.

In *Grady v. Commonwealth*, 325 S.W.3d 333, 355 (Ky. 2010), the Supreme Court of Kentucky held that:

To review an error under the palpable error standard, we must find that a manifest injustice has resulted from an error not properly preserved for appeal.

RCr 10.26. We also require a demonstration that a different outcome would have resulted at trial or evidence of an error so fundamental as to threaten a defendant's entitlement to due process of law. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). The burden to demonstrate palpable error is high, as a defendant must show that the error involved prejudice more egregious than that occurring in reversible error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). Indeed we must make an ultimate finding that the error was shocking or jurisprudentially intolerant. *Martin*, 207 S.W.3d at 4.

We do not find that Daugherty has met this high burden. To begin, we do not believe it to be a manifest injustice that a report was read into the record which was prepared by the state ballistics lab. Even if it was, however, we do not believe there would have been a different outcome at trial. Daugherty admitted shooting Adkins, the only question was whether he thought he was in danger and whether he intended to wound rather than kill him. Clearly, the jury believed he did not intentionally kill him as they only convicted him of Manslaughter II.

As to the statement made by Ricky Witt to the police, while it may have convinced the jury that Daugherty had gone in search of Adkins, it did not disprove Daugherty's defense that he had been afraid of Adkins and did not mean to kill him.

There was no palpable error. Thus, we affirm the rulings of the Madison Circuit Court and uphold the conviction.

ALL CONCUR.

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