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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001878-MR

STEVEN HALL — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 09-CR-00101

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Steven Hall was operating a pontoon boat when he struck and killed his wife, Isabel. He was convicted of second-degree manslaughter and sentenced to five-years' imprisonment. Four narrow issues are presented for our consideration: (1) whether expert testimony was admissible for the purpose of attacking the credibility of a police officer's in-court testimony; (2) whether

evidence that Hall had a romantic interest in a woman other than Isabel was properly admitted; (3) whether it was error to permit testimony that Hall intentionally accelerated the boat toward Isabel; and (4) whether the Commonwealth failed to give defense counsel witness statements in violation of RCr 7.26 We conclude that there was no reversible error and affirm.

Although Hall's trial continued over a span of six days, Hall and the Commonwealth have provided brief statements of the case. Because the issues presented are narrowly argued, we likewise chose brevity.

On May 29, 2009, Hall was operating a pontoon boat on Herrington Lake when the boat struck and killed Isabel. That same evening, Hall was arrested and charged with murder. During questioning by Detective Collins and Detective Short of the Kentucky State Police, he made lengthy statements which he unsuccessfully moved to suppress.

At the time Isabel was killed, a Northpoint prisoner, Wayne McMullen, was fishing on the shoreline approximately one hundred feet from Hall's boat and witnessed the boat strike Isabel. He testified that he heard Isabel scream for help and believed she was drowning. He then observed Hall look directly at Isabel, turn the boat in her direction, accelerate and strike Isabel. At that point, Hall stopped the boat with Isabel underneath and stood nonchalantly. McMullen testified that Hall made no effort to look under the boat and became concerned about Isabel only when a second pontoon boat approached. Based on

his observations, McMullen testified that Hall intentionally accelerated the boat causing it to strike Isabel.

Four passengers on another pontoon boat also witnessed Isabel's death: Tara Silbersdorf, Dan Merriman, Kenneth Bradshaw, and April Buehllar. Although the witnesses' estimates regarding their distance from Hall's boat ranged from three hundred to nine hundred feet, all testified that Isabel was screaming in the water, "Help me, please help me! He's going to kill me." The passengers on the second boat began to move toward Isabel to offer assistance.

Silbersdorf testified that she watched Hall turn his boat toward Isabel and accelerate ten to twenty feet. Shortly after Hall's boat stopped, the second pontoon boat approached and the passengers inquired if everything was all right. Hall assured them that there was no problem. When asked about the woman in the water, Hall responded that the woman was his wife and she was swimming under the boat. At that point, Silbersdorf saw Isabel floating under the boat face down. At some point, Hall jumped into the water and pulled Isabel's lifeless body from the water. Silbersdorf testified that Hall then waived his wife's dead hand at the passengers on the second boat.

The remaining testimony recited by the parties to this Court includes that of Dr. Richard Ofshe and Lori Devine, an employee in Hall's office. Hall sought to call Dr. Ofshe as an expert witness to testify that despite Detective Collin's testimony to the contrary, Collins improperly used the "Reid"

interrogation method.[1] After the trial court excluded the testimony on the basis of relevancy, it was entered by avowal.

Dr. Ofshe gave a general description of police interrogation tactics and reviewed the interrogation of Hall. He testified that Officer Collins used the Reid technique. He further opined that the technique should not have been used in Hall's case and used only after other interrogation methods had been exhausted.

Devine was permitted to testify that Hall told her that he loved her and would divorce Isabel when the children were older. Further, he and Isabel provided financial assistance to Devine, who denied that she had a romantic relationship with Hall and testified that Hall had no reason to believe that if he killed Isabel, he could be with her. Additional testimony relating to the relationship between Devine and Hall was introduced through co-workers who testified that Hall spent more time with Devine than other women in the office but that they did not witness inappropriate behavior. The office workers also testified that during the months prior to Isabel's death, Hall had been losing weight, wearing new clothes, and generally tended more to his personal appearance.

Hall's first argument concerns the denial of Dr. Ofshe's testimony. We begin with our standard of review. When reviewing a trial court's decision

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[1] The Reid technique is a trademarked interrogation method developed by the firm of John E. Reid & Associates, Inc., which involves, among other things, isolating suspects from family and friends, confronting them with inculpatory evidence, rebuffing denials of innocence, and minimizing the subject's involvement in the offense.

pertaining to the admissibility of evidence, this Court reviews for abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Because Dr. Ofshe was offered as an expert, the trial court was required to determine whether he was proposing to testify to scientific, technical, or other specialized knowledge that would assist the trier of fact to understand a fact in issue. *Id*. at 578. "In order to meet the above standard, proffered expert testimony must be relevant and reliable." *Id*.

Dr. Ofshe is not a stranger to the role of expert. His credentials were summarized in *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), where he was described as a social psychologist expert in the field of coercive police interrogation techniques and the phenomenon of false or coerced confessions. It was further noted that he had been on the faculty of the University of California at Berkeley since 1962, had a Ph.D. in psychology from Stanford University, was widely published and worked extensively with law enforcement officials and defense counsel. *Id*. at 1341.

In *Hall*, the Court held it was error to exclude Dr. Ofshe's testimony because the defense hinged on evidence that his confession was coerced. It reasoned:

> The (district) court indicated that it saw no potential usefulness in the evidence, because it was within the jury's knowledge. This ruling overlooked the utility of valid social science. Even though the jury may have had beliefs about the subject, the question is whether those

> beliefs were correct. Properly conducted social science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony, assuming its scientific validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried.
>
> The district court's conclusion therefore missed the point of the proffer. It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision. It would have been up to the jury, of course, to decide how much weight to attach to Dr. Ofshe's theory, and to decide whether they believed his explanation of Hall's behavior or the more commonplace explanation that the confession was true.

Id. at 1345. The Court's reasoning in *Hall* has not been universally accepted and there exists a divergence of opinion as to whether expert testimony concerning coerced confession is admissible. *See State v. Free*, 351 N.J. Super 203, 798 A.2d 83 (N.J.Super A.D. 2002)(discussing the views of other jurisdictions and holding that an expert could not testify on the subject of coerced confession because his testimony would not assist the trier of fact to understand the evidence or determine a fact in issue).

Recently, in *Terry v. Commonwealth*, 332 S.W.3d 56 (Ky. 2010), our Supreme Court held that where the defendant testified that the police interrogation was coercive and his confession was involuntary, expert testimony was admissible to aid the trier of fact in determining whether the confession was coerced. While

Terry appears to align this Commonwealth with the reasoning expressed in *Hall*, the facts in this case render it inapplicable.

The issue was not Dr. Ofshe's qualifications as an expert. The challenge by the Commonwealth was to the relevancy of his testimony.[2] Hall argued that the purpose of Dr. Ofshe's testimony was to disprove Detective Collin's testimony that he did not use the Reid technique. However, Hall did not testify at trial and presented no evidence that his statements to the officers were coerced. With this significant fact in mind, we test the relevancy of Dr. Ofshe's testimony.

"Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702." *Stringer v. Commonwealth,* 956 S.W.2d 883, 891 (Ky. 1997).

Relevancy is defined in KRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." There is no precise test and it is a determination which "rests largely in the

[2] Hall remarks in passing that the Commonwealth did not object to the admission of Dr. Ofshe's testimony. However, on August 23, 2010, the Commonwealth filed a motion to exclude Dr. Ofshe's testimony on the basis of relevancy. Prior to Dr. Ofshe's proposed testimony, the trial court held a hearing in regard to Dr. Ofshe's testimony after which it precluded his testimony.

discretion of the trial court and must be exercised according to the teachings of reason and judicial experience, considering its probative value." *Glens Falls Ins. Co. v. Ogden,* 310 S.W.2d 547, 549 (Ky. 1958). Our rules further provide that although relevant, evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

We agree with the trial court that Dr. Ofshe's testimony offered for the purpose of proving that Officer Collins used the Reid technique does not pass the relevancy test. In the absence of the defendant placing the voluntariness of his statements to the officers in issue, whether the Reid technique was or was not used does not tend to prove or disprove his innocence or guilt. Hall's attempt to discredit Officer Collins by expert testimony is equally unavailing.

It is well established that the credibility of a witness is a matter for the jury. *Estep v. Commonwealth,* 957 S.W.2d 191, 193 (Ky. 1997). "Credibility refers to whether a witness is being truthful or untruthful." *Jenkins v. Commonwealth*, 308 S.W.3d 704, 711 (Ky. 2010). Our Supreme Court has clarified the rule concerning the admission of collateral impeachment and has left the issue within the trial court's discretion. *See Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010). "A matter is considered collateral if the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness."

Simmons v. Small, 986 S.W.2d 452, 455 (Ky.App. 1998)(quoting *United States v. Beauchamp*, 986 F.2d 1, 4 (1st Cir. 1993)).

Based on Hall's admissions as to the use of Dr. Ofshe's testimony and Hall's failure to attack the reliability of his confession, we conclude that Dr. Ofshe's testimony was not only irrelevant but, if admitted, would have confused the issues presented to the trier of fact. The sole purpose of Dr. Ofshe's testimony was to discredit Officer Collins's testimony concerning the interrogation technique he used. Dr. Ofshe's general testimony regarding police interrogations and the method used by Officer Collins has no relevance to Hall's guilt or innocence because the reliability of Hall's statements was not challenged. We conclude the trial court did not err.

The second issue presented concerns testimony regarding Hall's relationship with Devine introduced by the Commonwealth for the purpose of creating a context for the events in the days prior to Isabel's death and to show motive. We agree with Hall that the testimony regarding his relationship with Devine was inadmissible.

Evidence of a romantic relationship has been admitted when a defendant is charged with the murder of his or her spouse on the theory that it is relevant to demonstrate motive. *Springer v. Commonwealth,* 998 S.W.2d 439, 450 (Ky. 1999). However, because the evidence tends to "smear" the defendant's character, where it has no nexus to the crime charged, it has been excluded in a number of cases. *See Barnett v. Commonwealth*, 763 S.W.2d 119, 124 (Ky. 1988).

Although we apply an abuse of discretion standard, we are unable to reconcile the rules of relevancy with the admission of the testimony concerning Hall's relationship with Devine. There was absolutely no evidence that Hall and Devine had a sexual relationship or that the two planned a future. Although, at some point, Hall inquired if Devine would be interested if he someday divorced Isabel, there was nothing to suggest that Devine agreed or that at the time of Isabel's death, Hall was contemplating being with Devine. The testimony did not tend to establish any connection between Hall's relationship with Devine and Isabel's death or provide a context for the events leading to Isabel's death. We conclude that the testimony was erroneously admitted.

Although error, we must examine whether the error was harmless. As stated in *Burchett v. Commonwealth*, 314 S.W.3d 756, 759 (Ky.App. 2010):

> The test for harmless error is whether on the whole case there is a substantial possibility that the result would have been any different. The relevant inquiry is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction. Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial. (internal citations and quotations omitted).

Considering the recited standards, we hold that the error was harmless.

Numerous witnesses heard Isabel's screams for help, observed Hall turn the boat and then accelerate toward Isabel. Based on the overwhelming evidence of Hall's reckless conduct, we conclude that the error was harmless.

Hall also contends that the trial court erred when it permitted McMullen and Silbersdorf to testify that Hall intentionally accelerated the boat toward Isabel and struck her. He argues that the testimony was inadmissible as expressions of opinion regarding Hall's state of mind.

KRE 701 permits a lay witness to testify to opinions based on perceptions. However, an exception exists if the opinion is based on the witness's own factual observations. "The collective facts rule applies to this type of opinion if the witness is expressing an opinion about another's mental conditions and emotions as manifested to that witness." *Commonwealth v. Sego*, 872 S.W.2d 441, 444 (Ky. 1994). As noted in *Clifford v. Commonwealth*, 7 S.W.3d 37l, 374 (Ky. 1999), there are numerous examples where lay witnesses have been permitted to express their opinion based on their observations.

> [L]ay witnesses have been permitted to testify as to the speed of a moving vehicle, *Clement Bros. Constr. Co. v. Moore,* Ky., 314 S.W.2d 526 (1958); the age of a person and whether that person was intoxicated, *Howard v. Kentucky Alcoholic Beverage Control Bd.,* 294 Ky. 429, 172 S.W.2d 46 (1943); the degree of physical suffering endured by another, *Zogg v. O'Bryan,* 314 Ky. 821, 237 S.W.2d 511 (1951); and the mental and emotional state of another, *Commonwealth v. Sego,* Ky., 872 S.W.2d 441, 444 (1994), *Emerine v. Ford,* Ky., 254 S.W.2d 938 (1953). In *King v. Ohio Valley Fire & Marine Ins. Co.,* 212 Ky. 770, 280 S.W. 127 (1926), a witness was permitted to testify that upon arriving at the scene of a fire, he "smell[ed] gasoline."

To the contrary, a witness has not been permitted to testify that a shooting was accidental where the witness was not present in the room when the shot was fired.

McQueen v. Commonwealth, 339 S.W.3d 441, 450 (Ky. 2011); *Gabbard v. Commonwealth*, 297 S.W.3d 844, 856 (Ky. 2009).

This case is distinguishable from the holding in *McQueen* and *Gabbard*. The witnesses observed the events of Isabel's death immediately before, during and after Hall struck her. The witnesses did not testify that Hall intended to kill Isabel but testified only to the facts as they were observed. Moreover, even if there was error, it cannot be considered prejudicial. Hall was not convicted of an intentional act but only of reckless conduct. Therefore, any error regarding the witnesses' observations that he intentionally struck Isabel was harmless. *Burchett,* 314 S.W.3d at 759.

The final issue emerged when Silbersdorf testified that she and the witnesses on the pontoon boat were interviewed twice. Defense counsel approached the bench and informed the Court that he had only one written interview and it did not contain any statement by Silbersdorf that Hall waived Isabel's dead hand. On the basis of RCr 7.26, defense counsel moved for a mistrial. A hearing was held after which the trial court found that there were no written witness statements not provided to defense counsel, and denied the motion.

RCr 7.26 provides in part:

> [T]he attorney for the Commonwealth shall produce any statement of the witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by him or (b) is or purports to be a substantially verbatim statement made by the witness.

> Such statement shall be made available for examination and use by the defendant.

The rule only requires "written statements to be made available for use by the defendant." *Yates v. Commonwealth*, 958 S.W.2d 306, 308 (Ky. 1997).

After conducting a hearing, the trial court found that all written statements were made available to defense counsel. The defense has offered no evidence to the contrary and only points to Silbersdorf's testimony that she was interviewed twice and conveyed to the officer that Hall waived Isabel's dead hand. A witness is not required to confine testimony to "the four corners of his or her written statement." *Id*. Trial counsel's role is to "scrutinize the motive or basis for such omissions or additions through the art of cross-examination." *Id*. We conclude there was no error.

Based on the foregoing, the judgment of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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