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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000709-MR

SHANNON HOUSER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CR-00776

COMMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Shannon Houser was convicted in the Fayette Circuit Court of tampering with physical evidence and leaving the scene of an accident and was sentenced to five years' imprisonment. He now appeals these convictions. After

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580. Senior Judge Henry concurred in this case prior to the expiration of his term of service as senior judge. Release of the opinion was delayed by administrative handling.

careful review, we affirm the March 24, 2009, judgment of the Fayette Circuit Court.

Houser was indicted on July 1, 2008, for tampering with physical evidence, leaving the scene of an accident, and possession of marijuana arising out of the collision of his truck with Connie Blount on April 13, 2008. He appeared before the trial court to enter a plea of guilty on February 2, 2009, but decided that he wanted to proceed to trial instead. After a jury trial conducted on February 3, 2009, through February 5, 2009, Houser was acquitted of the marijuana possession charge but convicted of the other two charges and sentenced to five years' imprisonment for tampering with physical evidence and twelve months in jail for leaving the scene of an accident, to run concurrently, for a total sentence of five years in the penitentiary.

At trial Marc Bramlage of the Lexington Fire Department testified that he was dispatched to the intersection of South Broadway and Maxwell Streets at 2:22 a.m. on April 13, 2008. There, he found a trauma victim, Connie Blount, being worked on by two emergency medical technicians. Bramlage's unit transported Blount to the University of Kentucky hospital, arriving at 2:39 a.m. Blount subsequently died of the injuries sustained in the accident.

Ryan Gish testified that he was a student at the University of Kentucky and a friend of Connie Blount. He and Blount were walking after leaving Two Keys Tavern at about 2:15-2:30 a.m. on April 13, 2008. As they were crossing the street at the intersection of South Broadway and Maxwell Streets, he

reached the curb, turned around, and saw Blount bent over in the roadway. He yelled at her to get out of the roadway, but she was struck by a truck. Blount was struck by the left front of the truck, making a loud thump, and her body did not go over the truck.

Gish described the truck as a silver GMC or Chevrolet. He testified that the truck slammed on its brakes, that the brake lights came on, the tires screeched, the truck fishtailed from the left to the right lane, hit the curb, paused or came to a complete stop for a second or two, and then peeled off with tires spinning. Blount was in the roadway and was unresponsive. Gish called 911, but an ambulance happened to pull up to the scene and stopped.

Lexington Police Department Collision Reconstruction Unit Officer Scott Lynch testified that he arrived at the scene at approximately 4:30 a.m. on April 13, 2008. He presented Commonwealth Exhibit 2, a diagram of the intersection with notations as to where various items of evidence were located at the collision scene. These items included coins, an amber colored lens fragment, a purse strap, trim from a vehicle, a cell phone battery and cover, a blood spot, light socket pieces, a clutch purse, skid marks, part of a lamp housing, and fragments of lights and vehicle trim. Officer Lynch testified that tire marks were present in the street and on the curb.

Officer Lynch received information from an Anderson County, Kentucky constable that Houser owned a truck that matched the description of the one involved in the accident, and two officers were dispatched to Houser's

residence. There, Officers Brian Taylor and Donnie Salmons found Houser's truck, a Chevrolet, with damage consistent with the collision. The officers obtained a search warrant for Houser's auto shop, as Houser told them that he had removed the grill of his truck at his auto shop. At the shop, the officers found the grill of Houser's truck in a bay area not hidden from view. The grill was broken on the driver's side, and part of the trim and part of an amber colored lens were missing.

Officer Lynch testified that the front area of the truck appeared to have been freshly worked on. A hair was found embedded in a wheel weight on the driver's side front tire. A cell phone bill was found in the truck, and a marijuana cigarette was found under the driver's seat. Lynch testified that the large mark visible on Blount's right thigh in an autopsy photograph was likely the point of impact with the truck. His opinion was that Blount went underneath the truck, and that the truck did apply its brakes, based on the tire marks on the street and near the curb.

Officer Lynch testified that based upon his experience as a reconstructionist and the evidence regarding the collision, a driver of the truck would have been able to feel a person being struck by the truck and going underneath the truck. Houser had told Lynch that he felt a thump, and when he got back to his shop, he looked at the fender and knew he had hit something.

Officer Salmons testified that when he went to Houser's home at approximately 8:30 p.m. on April 13, 2008, Houser's Chevrolet truck was in the

driveway with the grill/bumper missing and light apparatus hanging down from the front of the truck. Officer Salmons testified that during his conversation with Houser, Houser asked about the collision that had been on the news, bringing up the subject to the police himself. Houser told Officer Salmons that he had injured his eye while working on the truck that day at his auto body shop on De Roode Street. Officer Salmons said when the police took the grill from the garage as evidence, Houser went from an agitated state to placing his head in his hands and sighing loudly.

Officer Brian Taylor testified that he also went to Houser's residence on April 13, 2008 around 8:30 p.m. Houser had greasy hands and bloodshot eyes and stated that while he was working on his truck, a piece of the truck had hit his eye. Officer Taylor also testified that Houser asked them if they had heard about a collision at Broadway and Maxwell, and they stated that they had. Officer Taylor also confirmed that when they confiscated the grill, Houser put his head in his hands and sighed.

Forensics Officer Jerry Walsh testified that he took pictures of the scene. He testified that he obtained Blount's clothing from another officer, specifically a sweater with a piece of plastic on it. He also took possession of a DNA card and head hair from Blount.

Forensics Detective Tim Ballinger testified that he processed Houser's truck for evidence. A video tape depicting the truck from all angles, including underneath, was played for the jury.

Melissa Brown, a serologist with the Kentucky State Police Crime Laboratory in Frankfort, testified that suspected blood swabbed from the driver's side rear wheel of the truck matched Ms. Blount. The estimated frequency of this DNA profile was one person in 130 quintillion, based on the relevant population of the United States. Ms. Brown further testified that swabs for touch DNA were taken from the front grill and the headlight casing of the driver's side of the truck. The DNA from these swabs was consistent with a mixture of Ms. Blount's DNA and an untested person.

Laura Mosenthin, a trace analyst from the Kentucky State Police Crime Laboratory, testified that she matched a piece of lens from the scene with the grill of Houser's truck. She also testified that sweater fibers found in the grill and trim of the truck could have come from Ms. Blount's sweater, as they were similar in color and microscopic characteristics to the fibers of Ms. Blount's sweater.

Detective Matt Brotherton testified that in the course of his investigation, he determined that Houser made seven phone calls at 2:38 a.m. and afterward on the morning of the collision. These calls utilized a cell phone tower at 200 Bolivar Street, a location close to the site of the accident, placing the cell phone within a block or two of the scene.

Detective Brotherton also played a recorded statement by Houser for the jury. In that statement, Houser said he had been working on a Caravan when he pulled back and hit his truck with a part. He stated that he took the grill off, not

sure if it had been damaged. Houser denied touching the headlights or trying to hide anything.

Houser told Detective Brotherton that on the day of the accident, he had briefly been at a bar shooting pool and was home at 11:30 p.m. He was later going to his auto shop that morning at 2:30 a.m., when he turned onto Broadway and saw a guy standing at the crosswalk who looked wobbly. At this point, Houser was driving in the left lane. He stated that he felt a thump and thought "What the hell was that?" He was not aware that he jammed on his brakes. Once at his shop, he looked at the front of his truck and found nothing wrong except a dent in the fender. Houser told Detective Brotherton that he did not know about any incident until he saw it on the news. He stated, "I never seen nothing, man."

Houser did indicate to Detective Brotherton that he had taken a Lortab that day and had one bourbon and coke to drink. Houser had indicated that his reason for going to the shop that morning was to see if he could find any of the tools that had been stolen from him from suspected thieves who had a shop nearby. Detective Brotherton testified that he did not find it credible that Houser could have hit Ms. Blount, had her roll under the truck, and not feel it.

Dr. Cristin Marie Rolf, a Kentucky state medical examiner, performed the autopsy on Ms. Blount. She noted a large injury to Ms. Blount's right thigh, and abrasions on her back, right arm, and abdomen that were consistent with being rubbed or scraped on a surface. Dr. Rolf stated that the cause of Ms. Blount's

death was blunt impact to the head, trunk, and extremities, with multiple injuries to organs and the skeleton due to an auto collision.

Houser called one witness during the guilt phase, Gary Mallory, who testified that he had known Houser since 1990-1991. Mallory stated that Houser always worked on his truck, and he had seen Houser remove the grill on several occasions. Mallory testified that on April 13, 2008, he called Houser regarding a financial debt between the two men. Mallory stated that Houser indicated that he did not have the money and was distraught and upset that he may have done something or was somewhere he didn't need to be. Mallory did not remember the entire conversation, but stated that he was at his house with an Anderson County constable during the phone call, and he told the constable about his conversation with Houser and told the constable the color of Houser's truck.

The Commonwealth recalled Detective Brotherton in rebuttal. He testified that he had a conversation with Mallory on April 17, 2008. Mallory told the detective about his conversation with Houser on April 13, 2008. Mallory told the detective that he called Houser to sort out a debt matter, and Houser said, "I'm sorry I can't do anything. I've done something bad, and I'm going to have to get out of town."

After the jury found Houser guilty of tampering with evidence and leaving the scene of an accident, he was sentenced to five years' imprisonment to run concurrently, and a motion for a new trial was overruled. This appeal now follows.

Houser first argues that the Commonwealth's witnesses usurped the function of the jury when they were permitted to testify that Houser knew he collided with Blount. Houser contends that the testimony of Officer Lynch and Detective Brotherton invaded the province of the jury when the officers answered questions about the collision of his truck with Ms. Blount.

Officer Lynch testified as an expert in the field of accident reconstruction. Lynch was asked if he had seen the accident photographs and based on his reconstruction, if he had an opinion whether someone driving the truck would have known they struck Ms. Blount. After a defense objection and a bench conference, the trial court overruled the objection but instructed the Commonwealth to rephrase the question in terms of the objective evidence in this case to what a driver objectively would have felt or known under the circumstances.

The Commonwealth then asked Officer Lynch whether, based on his investigation and knowing the forensic evidence in this case, what a driver in a vehicle objectively would feel as Ms. Blount went under the truck. Officer Lynch responded that the underneath of the truck showed signs of rubbing and cleansing marks, and there were places where suspension components had been rubbed clean. He continued to testify based on his experience and as a driver himself, but before he completed his answer, the defense raised another objection. The trial court directed Officer Lynch to answer based on his experience as a reconstructionist, and he responded that if a suspension component is rubbed, and

as in this case, struck by a person, a driver "would have been able to feel it." Officer Lynch pointed out that the tire marks at the scene indicated the driver reacted to something and would have known he hit something. Lynch testified that Houser had also told Detective Brotherton and himself at Houser's shop that he felt something, and once he inspected his truck fender, he knew he had hit something.

Kentucky law states:

> 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). Furthermore, the decision to qualify a witness as an expert rests in the sound discretion of the trial court. *See Kentucky Power Co. v. Kilbourn*, 307 S.W.2d 9, 12 (Ky. 1957). Accordingly, we will not disturb the trial court's finding, absent an abuse of discretion.

In the instant case, there was no allegation that Officer Lynch was not qualified to render an opinion on the accident. His testimony satisfied the *Daubert* requirements that the testimony be relevant and reliable, of a scientific nature, and assist the trier of fact in understanding the case. *Daubert*, 509 U.S. at 592-593. Furthermore, Officer Lynch's testimony was certainly relevant under *Daubert* and

KRE 401, as it tended to make the existence of a fact of consequence more or less probable than it would be without that evidence.

Officer Lynch's reliability was established by his training and experience. It is well-accepted that collision reconstructionists bring a specialized and scientific knowledge to the courtroom. "Experts are now widely regarded as indispensable in automobile accident litigation." Lawson, *The Kentucky Evidence Law Handbook*, Section 6.30 [2], Fourth Edition (2003). As such, reconstructionists definitely provide specialized or scientific knowledge of great assistance to juries in deciding the facts of cases, as required for the admission of expert testimony by KRE 702. Finally, the testimony's relevance was not substantially outweighed by any prejudicial effect under KRE 403. The Commonwealth was entitled to present proof that would assist the jury and provide information about motor vehicle collisions beyond the knowledge of an average citizen.

Officer Lynch's testimony did not usurp the function of the jury. Officer Lynch did not tell the jury that Houser was guilty of any offense, but only that based on his expertise in accident reconstruction and the evidence from this accident, he felt that a driver under these conditions would have felt something during this collision. His testimony could assist the jury in deciding whether Houser knew that he had been involved in an accident causing injury or death and then left the scene without having stopped to determine the extent of any damage or injuries.

Further, his testimony could assist the jury in deciding if Houser knew he was in possession of physical evidence relevant to an official proceeding. Officer Lynch's testimony pertained to elements of the charged offenses of leaving the scene of an accident and tampering with physical evidence, but the testimony did not usurp the jury's ultimate decision as to whether Houser was guilty of those charges. *See Cormney v. Commonwealth*, 943 S.W.2d 629, 634 (Ky. App. 1996).

In summation, the trial court did not abuse its discretion and properly admitted Officer Lynch's testimony as expert evidence.

Detective Brotherton's testimony about the credibility of Houser's version of events was also admissible, and the trial court properly admitted it. After establishing through Detective Brotherton that Houser was cooperative, Houser's counsel asked Brotherton if there was "anything" in Houser's statement that he found not to be credible. Detective Brotherton then answered that he did not find Houser's testimony about his presence at a particular bar and his cell phone calls credible.

On redirect, the Commonwealth asked if Detective Brotherton found Houser's statement that he did not feel Ms. Blount under his vehicle credible, and Detective Brotherton answered that he did not find that credible. The trial court overruled defense objections to such testimony, finding that Houser's counsel opened the door to this line of questioning by asking Detective Brotherton if he found "anything" in Houser's statements to police to not be credible.

The trial court correctly found that Houser's counsel had opened the door for the Commonwealth to pursue this line of questioning. "It is an established and recognized rule of practice that a party to litigation, who first introduces into the trial of the case either irrelevant or incompetent evidence cannot complain of the subsequent admission by the court of like evidence from the adverse party, relating to the same matter." *Commonwealth v. Alexander*, 5 S.W.3d 104, 105-106 (Ky. 1999) (quoting *Dunaway v. Commonwealth*, 239 Ky. 166, 39 S.W.2d 242, 243 (1931)).

Houser contends that Detective Brotherton's testimony about the truck hitting Ms. Blount was not scientific or technical. However, it did not have to be, as Brotherton's testimony was not admissible as expert testimony in this capacity, but as a fair question after the door to the credibility of Houser's statement had been opened by Houser's own counsel. We find no error in the admission of Detective Brotherton's statements.

Houser further argues that the Commonwealth made a prejudicial double jeopardy argument by arguing to the jury that there was no doubt evidence was removed because Houser drove the truck from the scene. Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute "requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). "KRS 505.020(1)(a) and (2)(a) codify this rule." *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996).

While driving away in the truck after running over Ms. Blount was part of both the tampering with physical evidence charge and leaving the scene of an accident charge, each crime requires proof of an element not common with the other. KRS 524.100, Tampering With Physical Evidence, requires proof that the defendant believed an official proceeding may be pending or instituted and that he conceals, removes, or alters physical evidence that he believes could be used against him, with the intent to impair its verity or availability in that proceeding. KRS 189.580, Leaving the Scene of an Accident, requires proof that a defendant was involved in an accident resulting in injury or death and failed to stop and ascertain the extent of any injury or to render reasonable aid. These two crimes clearly contain elements that are not common to the other, and the argument that Houser removed evidence when he drove away from the scene does not constitute double jeopardy.

Houser next argues that there was insufficient evidence that he removed, concealed, or disposed of evidence with knowledge that an official investigation was imminent or ongoing. To the contrary, there was sufficient evidence, and thus Houser's argument is without merit.

KRS 524.100 provides that a person is guilty of tampering with physical evidence when, "believing that an official proceeding is pending or may be instituted, he: (a) Destroys, mutilates, conceals, removes, or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official

proceeding . . . . ”

Houser contends that he did not know he may have committed a crime and that the grill was located at his shop in plain view and was not concealed or removed. Therefore, Houser argues there was not sufficient proof to convict him of tampering with physical evidence. However, Houser’s testimony about seeing Gish on the side of the street and his later statement that he knew he had struck something when he saw the bumper of his truck, combined with the physical evidence that Houser applied his brakes, brought the vehicle to a stop, and then sped off, indicates that he *knew* something had occurred, and that at the very least, he had been involved in a collision. Instead of stopping and informing someone what happened, he fled the scene and later committed the ultimate acts of concealment and removal of his truck grill and bumper.

Further, in *Burdell v. Commonwealth*, 990 S.W.2d 628, 633 (Ky. 1999), the Kentucky Supreme Court elaborated on KRS 524.100:

> [O]ne who conceals or removes evidence of criminal activity contemporaneously with the commission of his crime commits the offense of tampering with physical evidence. . . . The compelling logic of these decisions is that one who has committed a criminal act and then conceals or removes the evidence of his crime does so in contemplation that the evidence would be used in an official proceeding which might be instituted against him.
>
> The official commentary to KRS 524.100 clarifies that a conviction of this offense may be obtained even if the tampering occurred prior to the initiation of an official proceeding. ‘[I]t is sufficient if the defendant believes an official proceeding may be instituted and if

> he engages in the proscribed conduct with the specified intent to impair the truth or availability of evidence he believes will be used. . . .'

(Internal citations omitted). In the instant case, Houser concealed or removed evidence of the collision contemporaneously with his offenses by driving away from the scene and removing the grill from his truck. The evidence was sufficient to support his conviction for tampering with physical evidence of a crime and for the jury to infer that he concealed and removed his truck and grill in order to impair its availability in an official proceeding against him.

Houser next argues that Detective Brotherton's testimony regarding statements made by Gary Mallory was inadmissible collateral impeachment evidence. Evidence is collateral if it is not relevant for a purpose other than mere contradiction of in-court testimony. *Simmons v. Small*, 986 S.W.2d 452, 455 (Ky. App. 1998). A witness may not be impeached on a matter irrelevant and collateral to the issues in the action. *Id.*

In the instant case, Mallory testified on direct examination that when he and Houser were discussing a debt between the two of them, Houser was distraught and upset and stated that he may have done something or was someplace he did not need to be. In rebuttal, the Commonwealth offered Detective Brotherton's testimony, and Brotherton testified that Mallory told him that Houser said he had done something bad and had to get out of town. Houser argues that this statement was not relevant because it did not prove an element of an offense

and was offered for the purpose of raising the inference that Houser knew he was guilty and to characterize Houser as a bad guy.

However, the statements attributed to Houser by Mallory are quite different than the statements Detective Brotheron testified about. Saying you were in a place you do not like or doing something you didn't want to do is clearly distinguishable from stating to your friend that you have done something bad and need to get out of town. Detective Brotherton had information about Houser's statements that not only differed from Mallory's testimony at trial, but was also highly relevant. Brotherton's testimony was not just offered to contradict Mallory, but also to show that Houser, on the same day as the collision with Ms. Blount, believed he had done something bad and needed to leave town. As evidence of Houser's guilt, this was appropriate for the jury to hear. Such evidence further passes the relevancy tests of KRE 401 and 402. Its probative value is not substantially outweighed by the danger of undue prejudice under KRE 403. Houser's statement indicated that he *knew* he had done something wrong, which goes to the heart of the case and is therefore not collateral.

Houser next argues that he was entitled to a change of venue or a continuance, and the trial court erred to his prejudice in denying such. Houser filed a motion for a change of venue on January 6, 2009. The motion was not verified by Houser, as required by the application for a change of venue under KRS 452.220(2), nor did it contain any supporting affidavits, as also required. The motion was later supplemented with fourteen affidavits supporting a change of

venue, all executed on January 12, 2009, and filed with the court on January 13, 2009.

However, as the trial court noted after its hearing concerning the motion for change of venue, the affidavits were not filed *with* the motion to change venue, and they did not comply with KRS 452.220(2) because they did not state that the affiants were acquainted with the state of public opinion in Fayette County, and the affiants did not swear that they verily believe that the statements in the petition for a change of venue were true.

Compliance with KRS 452.220 is mandatory. *Lewis v. Commonwealth*, 42 S.W.3d 605, 609 (Ky. 2001). Furthermore, as the trial court properly noted, the affidavits in support of Houser's motion to change venue did not establish any prejudice, and the trial court properly determined that any issues of prejudice could be dealt with during voir dire. Finally, Houser does not assert that a single juror was improperly seated at his trial.

Furthermore, the trial court has wide discretion in ruling on a motion to change venue. *See Wood v. Commonwealth*, 178 S.W.3d 500, 513 (Ky. 2005) (internal citation omitted).

> In determining the proper venue for a criminal trial, the central concern is necessarily to afford the defendant a fair trial, and a change of venue is appropriate when it appears that the defendant cannot receive a fair trial in the county of prosecution. A change of venue may be granted upon a showing that: (a) there has been prejudicial news coverage; (2) the coverage occurred prior to trial; and (3) the effect of the news coverage is 'reasonably likely to prevent a fair trial.'

Id. (Internal quotations and citations omitted).

In the instant case, the trial court conducted a hearing and determined Houser had not complied with the statutory process of changing venue and had not demonstrated that prejudice would prevent him from having a fair trial. The trial court properly conducted extensive *voir dire* to screen for those who might have been tainted by pretrial publicity. There was no abuse of the wide discretion afforded the trial court by not granting a change of venue.

Alternatively, Houser argues that a continuance should have been granted when he changed his plea from guilty to not guilty and decided to proceed to trial. The trial judge has wide discretion in managing a case, including the decision to grant a continuance. *See* RCr 9.04. The decision regarding a continuance will not be disturbed on appeal unless there is a showing of substantial prejudice. *Wilson v. Commonwealth*, 601 S.W.2d 280, 285 (Ky. 1980). Houser fails to show any prejudice whatsoever that resulted from the court failing to grant a continuance in his case. Accordingly, we will not disturb the trial court's decision on appeal.

Finally, Houser argues that he did not receive a fair trial. In support of this argument, Houser points to the testimony by Ms. Blount's father. Mr. Blount testified at trial that his daughter was an equestrian major at the University of Kentucky who enjoyed riding her horse, and he characterized Connie as his best friend. Houser argues that his case was tried like a murder case, with Ms. Blount's

photograph displayed to the jury throughout closing arguments and with Mr. Blount testifying about the effect of his daughter's death on him.

Houser cites to *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), arguing that the trial court must balance the probative value with prejudice and exclude inflammatory evidence. In *Sanborn*, the Court disapproved of the use of the victim's husband, son, mother, and two teenaged daughters testifying emotionally about the deceased. *Id.* at 542-543. We find the testimony in this case to be vastly different from that in *Sanborn.*

The Commonwealth is permitted to present some personal evidence to the jury about the deceased. *See McQueen v. Commonwealth*, 669 S.W.2d 519, 523 (Ky. 1984). In that case, the father of the victim was permitted to testify to his daughter's age, college graduation, and her saving money to pursue a master's degree. *Id.* Similarly, Mr. Blount testified about his daughter's education and interests, and his testimony is quite distinguishable from the cumulative and emotional testimony disapproved of in *Sanborn*. In this regard, Mr. Blount's testimony did not render Houser's trial unfair and was properly admitted by the trial court under *McQueen*.

Houser also argues that portions of a taped statement he made to Detective Brotherton were also improperly played for the jury. Houser argues that the taped statement improperly included his testimony that on the day of the accident he had taken a Lortab and had one bourbon and coke, but did not smoke

marijuana. Houser argues that there was no evidence he was impaired on the night of the accident and that it was not an element of any offense charged.

The Commonwealth argues that the taped statement actually helped Houser, because it provided information to the jury that Houser had not smoked marijuana. The Commonwealth also contends that the evidence was relevant concerning Houser's ability to effectively perceive the events surrounding the collision.

While the record indicates that the portion of the statement indicating that Houser had taken a Lortab was intended to be excluded, we conclude that the inclusion of this statement was harmless error. Houser has not shown that absent the inclusion of this statement, the results of his trial would have been any different, and there was sufficient evidence tying him to the collision and the ensuing events. Accordingly, the inclusion of the Lortab portion of Houser's statement constitutes harmless error and did not render his entire trial unfair.

For the foregoing reasons, we affirm the final judgment and sentence of imprisonment rendered by the Fayette Circuit Court on March 24, 2009.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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