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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001686-MR
AND
NO. 2015-CA-001687-MR

BETTY HANKS — APPELLANT

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HON. RONNIE C. DORTCH, JUDGE
ACTION NOS. 10-CR-00026 AND 13-CR-00013

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Betty Hanks ("Betty") has appealed from the Hancock Circuit Court's Trial Order and Judgment entered October 27, 2015. Following a careful review, we affirm in part, vacate in part, and remand.

BACKGROUND

On or about August 25, 2010, Scott Whitaker of the Cabinet for Health and Family Services and Deputy John Marvel of the Hancock County Sheriff's Office responded to a complaint of an adult being neglected at the appellant's home in Hawesville, Kentucky. Upon arrival, they saw 78-year-old Ruth Mutchman looking out the back door of the residence. When the deputy tried to persuade Ruth to open the door to the house, she indicated she could not do so because she was locked inside the room.

The room in which Ruth was captive had a door to the outside, but it was screwed shut with multiple screws, and the deputy was only able to open the door after several forcible attempts to break through. The room within was hot and stifling, with an overwhelming odor of urine. Ruth was the only occupant of the room. She was unkempt, with long hair on her chin, and long fingernails and toenails. Her bed was a bare mattress, stained and soaked with urine. The room also contained a second door that would ordinarily allow the occupant access to the rest of the house, except that this door had a reversed door knob that could lock occupants in the room from the outside. This door was locked as well, and Deputy Marvel was forced to use a screwdriver to pry open the door to access the rest of the house. No one was home besides Ruth.

Whitaker and Deputy Marvel removed Ruth from the house and left a note for the homeowner. Later that day, Betty contacted Deputy Marvel as a result

of the note and came to him for an interview. Betty was Ruth's daughter, and she lived in the home where Ruth was found, along with Betty's husband, Kenneth Hanks.

After investigation, it appeared Betty held Ruth's power of attorney and had also put her name on Ruth's bank accounts. Betty had written tens of thousands of dollars in checks from Ruth's account, to herself and to cash. Betty had also withdrawn money from Ruth's savings, held cash back from making deposits, and used Ruth's money to open an Individual Retirement Account with herself as Ruth's sole beneficiary. Betty also collected rent every month from her son and his girlfriend, who were living in a home owned by Ruth. On the day Betty was indicted, she wrote a check on Ruth's account with "lawyer" written in the memo line.

Betty and Kenneth were indicted by the Hancock County grand jury on October 8, 2010 ("First Indictment").[1] The First Indictment charged Betty with "Knowingly Abusing or Neglecting An Adult when as caretaker for Ruth Mutchman, she unlawfully imprisoned Mrs. Mutchman and failed to provide her adequate care."[2] On May 3, 2013, the Hancock County grand jury returned

[1] Indictment No. 10-CR-00026. Kenneth died in November 2010, and his indictment was dismissed.

[2] Kentucky Revised Statute (KRS) 209.990(2), a Class C felony.

another indictment against Betty ("Second Indictment").[3] The Second Indictment contained two charges against Hanks. Count One charged as follows:

> That on or about May 24, 2010 in Hancock County, Kentucky, [Betty] committed the offense of Theft by Failure to Make Required Disposition, $10,000 or More, when she failed to deposit the proceeds from the sale of Ruth Mutchman's property to Tom Mutchman in Ms. Mutchman's account.[4]

Count Two alleged:

> That between January 14, 2008 and August 25, 2010 in Hancock County, Kentucky, [Betty] committed the offense of Knowingly Exploiting an Adult over $300 when she, being a caretaker and fiduciary of Ruth Mutchman, knowingly and unlawfully misappropriated assets and spent Ruth Mutchman's money for the defendant's sole benefit.[5]

On August 2, 2013, the circuit court entered an order on the Commonwealth's motion consolidating the two indictments.[6] Finally, the circuit court entered an "Amended Indictment" prior to *voir dire* on the first day of trial, August 26, 2015. This Amended Indictment went beyond mere consolidation, however, in that it completely removed what was previously Count One in the Second Indictment, "Theft by Failure to Make Required Disposition, $10,000 or More," and added a new charge of "Knowing Exploitation of an Adult over $300"

[3] Indictment No. 13-CR-00013.

[4] KRS 514.070, a Class C felony.

[5] KRS 209.990(5), a Class C felony.

[6] The order indicates Indictment Nos. 10-CR-00026 and 13-CR-00013 would be tried together "as if the prosecution were under a single indictment, information, complaint or uniform citation," pursuant to Rules of Criminal Procedure (RCr) 9.12.

for dates between August 25, 2010, and February 14, 2011, as Count Three of the Amended Indictment.[7] This Amended Indictment was entered over Betty's objection, and was not presented by a grand jury nor signed by a foreperson of a grand jury. A four-day jury trial was conducted from August 26 to August 31, 2015. Betty was found guilty on all three counts of the Amended Indictment and sentenced to one year for Wanton Neglect of an Adult by Caretaker and five years for each count of Knowing Exploitation of an Adult by a Caretaker, for a concurrent sentence of five-years' imprisonment. These consolidated appeals followed.

ANALYSIS

Betty appeals five separate issues. First, she alleges the trial court erred in amending the indictment such that it exceeded the court's authority. Second, she contends the trial court erred in excluding out-of-court statements as hearsay, thereby depriving her of the ability to present a complete defense. Third, she argues the trial court erred by preventing her from introducing the entirety of her interview with Deputy Marvel. Fourth, she alleges the trial court erred in excluding evidence regarding farm subsidies received by her brother. Finally, she challenges the jury instructions as being based on outdated statutes.

[7] Count Two of the Amended Indictment is largely the same as that listed as Count Two of the Second Indictment, except that the date range of the charged offense was changed from "between January 14, 2008 and August 25, 2010" to "on or about January 22, 2008 through August 25, 2010."

Betty first argues the Amended Indictment added a new charge in violation of RCr 6.16. The Commonwealth argues Theft by Failure to Make Required Disposition of Property and Knowing Exploitation of an Adult over $300 both require a theft of funds, so the amendment did not result in a substantial change and Betty had sufficient notice of the facts and circumstances surrounding the charges. We disagree.

"Subject matter jurisdiction is determined from the indictment." *Commonwealth v. Adkins*, 29 S.W.3d 793, 794 (Ky. 2000). In addition,

> [a] criminal prosecution requires the existence of an accusation charging the commission of an offense. Such an accusation either in the form of an indictment or an information, is an essential requisite of jurisdiction. In Kentucky, subject matter jurisdiction over a felony offense may be invoked either by a grand jury indictment or by information in cases where the individual consents.

Malone v. Commonwealth, 30 S.W.3d 180, 183 (Ky. 2000). Appellate review of this issue is *de novo*, as "jurisdiction is generally only a question of law." *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). While it is true amendment under RCr 6.16 has been described as "a lenient rule," *Schambon v. Commonwealth*, 821 S.W.2d 804, 810 (Ky. 1991), under RCr 6.16, Kentucky does not allow substitution of one offense for another.

> [A] trial court lacks jurisdiction to change a valid indictment except as provided by Kentucky Rules of Criminal Procedure (RCr) 6.16. RCr 6.16 provides in pertinent part that a court "may permit an indictment, information, complaint or citation to be amended any time before verdict or finding *if no additional or different*

> *offense is charged* and if substantial rights of the defendant are not prejudiced."

Crouch v. Commonwealth, 323 S.W.3d 668, 672 (Ky. 2010) (emphasis in original) (footnote omitted).

The Commonwealth's point about the similarity of the substituted offenses is well-taken, but this basic similarity does not alter the fact that these are different offenses defined in different statutes, *i.e.* KRS 514.070 and KRS 209.990. The Supreme Court of Kentucky has previously held whether offenses are "different" for RCr 6.16 purposes may be determined by whether they appear in different statutes or in subsections within the same statute.

> The amendment allowed did not result in appellants being charged with a different offense. To the contrary, the amendment merely altered the designation of the subsection of the statute under which appellants were charged.

Schambon, 821 S.W.2d at 810. In the case *sub judice*, removing the charge of theft pursuant to KRS 514.070 and replacing it with a charge of knowing exploitation of an adult under KRS 209.990 was an impermissible amendment under RCr 6.16 as it charged an "additional or different offense."

The Commonwealth urges us to deem this harmless error under RCr 9.24, because both offenses are Class C felonies, Betty received concurrent sentences, and vacating the charge would not change the time she will serve under the judgment. Further, the Commonwealth notes Betty was sentenced to five years —the minimum term possible. However, indictments give the circuit court subject

matter jurisdiction over a felony offense. *See Malone*, 30 S.W.3d at 183. Without subject matter jurisdiction, "the court has not been given any power to do anything at all in such a case." *Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007) (citing *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970)) (internal quotations omitted). "It is well-established that a judgment entered by a court without subject matter jurisdiction is void." *Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422, 430 (Ky. App. 2008). Incorrect amendment of the indictment led directly to a superfluous felony conviction, and we cannot deem that harmless error. We vacate the judgment and conviction with regard to Count Three of the Amended Indictment, as it resulted from a charge not properly handed down by the grand jury.

Betty next contends the trial court erred by excluding as hearsay certain out-of-court statements, thereby preventing her from presenting a complete defense. Ruth and Kenneth died before Betty's trial began. That left Betty the only witness to testify as to a key part of her defense—Ruth was locked in her room because while suffering from dementia, she struck Kenneth on the head with a metal rolling pin. Kenneth called Betty, screaming. When Betty returned home, she found Kenneth on the floor with a head injury. Ruth was also there, dressed in men's clothing, with the rolling pin and a knife lying on the floor beside her. Betty alleged after Kenneth was taken to the hospital for treatment he no longer felt safe sleeping in their home without reversing the lock on Ruth's door and locking her inside.

The trial court granted the Commonwealth's motion *in limine* on the first day of trial excluding hearsay under KRE[8] 802 related to the incident wherein Ruth allegedly hit Kenneth in the head, rejecting Betty's contention that four hearsay exceptions made the testimony admissible, but giving no explanation for its ruling. During the same hearing, the trial court granted the Commonwealth's motion *in limine* excluding the contents of Dr. Rogan's deposition.[9] Other hearsay objections were sustained against Betty at trial, which she claims prevented her from explaining her state of mind.

As a preliminary matter, a trial court's ruling as to the admissibility of hearsay will not be disturbed unless found to be clearly erroneous. *Ernst v. Commonwealth*, 160 S.W.3d 744, 752 (Ky. 2005). A defendant is not entitled to submit hearsay as evidence, even when it is alleged to be mitigating. *Foley v. Commonwealth*, 17 S.W.3d 878, 890 (Ky. 2000) (overruled on other grounds by *Stopher v. Commonwealth*, 170 S.W.3d 307 (Ky. 2005)). However, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Justice v. Commonwealth*, 987 S.W.2d 306, 313 (Ky. 1998) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297, 313 (1973)). Finally, even when a trial court's hearsay ruling is found to be in error, it may be deemed harmless if it fails to "substantially [sway] the judgment." *Harris v.*

[8] Kentucky Rules of Evidence.

[9] Dr. Rogan was Kenneth's family physician and treated Kenneth after his head injury.

Commonwealth, 384 S.W.3d 117, 129 (Ky. 2012) (citing *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009)).

With these principles in mind, the motion *in limine* granted to the Commonwealth excluding any and all hearsay evidence related to Ruth striking Kenneth in the head, comes very close to a mechanical application of the hearsay rule specifically forbidden by *Chambers*. There is no indication the trial court gave due consideration to the applicability of the relevant hearsay exceptions. Most notably, the initial telephone call from Kenneth to Betty wherein he was described as "screaming" at her for assistance after the attack could have been considered an excited utterance, present sense impression, or indication of state of mind, all valid exceptions to the hearsay rule under KRE 803(1)-(3). The trial court, for unknown reasons, declined to view it as such.

While the exclusion based on the blanket motion *in limine* is troubling, ultimately we believe it was, at most, harmless error. Despite the restrictions, Betty was able to give cogent testimony regarding her personal observations as to the circumstances of Ruth's attack on Kenneth. She was able to testify she received an excited call from Kenneth; she rushed home; she discovered her wounded husband and her mother; and the rolling pin was dented and next to a knife beside her mother. She was also able to testify as to the fear she and her husband felt after the attack, and convey that fear as the reason for locking her mother in her room. Betty may have felt some constraint under the court's hearsay exclusions, but she was nonetheless able to provide a narrative to the jury.

In a similar fashion, we do not believe there was error in the court's exclusion of Dr. Rogan's deposition. While statements made for purposes of medical treatment or diagnosis are valid hearsay exceptions under KRE 803(4), the trial court found the doctor's deposition contained much speculation. In addition, allegations within the deposition about the supposed perpetrator would have been inadmissible. Dr. Rogan specifically states within the deposition the identity of Kenneth's assailant would not be pertinent to his medical diagnosis, and this is supported by case law. "It is well settled that the identity of the perpetrator is rarely, if ever, pertinent to medical diagnosis or treatment." *Alford v. Commonwealth*, 338 S.W.3d 240, 247 (Ky. 2011) (citing *Garrett v. Commonwealth*, 48 S.W.3d 6, 11–12 (Ky. 2001)). Finally, there are allusions within Dr. Rogan's deposition that Kenneth told at least one medical provider it was *his wife*, Betty, who actually hit him on the head with the rolling pin. In conclusion, we find no error in the trial court's exclusion of Dr. Rogan's deposition as being overly speculative, and, far from being prejudicial, the exclusion of the deposition may have actually helped Betty in her defense.

Betty also alleges the trial court erred in excluding as hearsay other out-of-court statements related to her state of mind. Specifically, she contends she was prevented from testifying about statements made to her: by her brother, when she telephoned him asking for advice; by Ruth regarding wetting the bed; and lastly, that would explain why she chose to share a joint bank account with Ruth. We do not believe Betty was prejudiced by the exclusion of portions of testimony

she sought to give. Betty was able to testify she telephoned her brother for advice, Ruth's bed had no sheets because of bedwetting, and she chose to use a joint bank account because she did not wish to keep strict account of each transaction. Inability to provide hearsay testimony did not prevent her from explaining her actions to the jury in such a way as to "substantially [sway] the judgment." *Harris v. Commonwealth*, 384 S.W.3d 117, 129 (Ky. 2012) (citing *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009)). Any error was harmless at best.

As her third assignment of error, Betty asserts the trial court abused its discretion in not permitting her to introduce the entirety of her interview with Deputy Marvel. She cites KRE 106 which states:

> [w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in *fairness* to be considered contemporaneously with it.

(Emphasis added). The Commonwealth introduced six portions of the taped interview; the trial court overruled Betty's request to play the remainder. Betty argues the entire interview should have been played, objecting to the "piecemeal" nature of the presentation.

KRE 106 does not compel full introduction of a recording merely because a portion was introduced into evidence. *Sykes v. Commonwealth*, 453 S.W.3d 722, 726-27 (Ky. 2015) (citing *Schrimsher v. Commonwealth*, 190 S.W.3d

318, 331 (Ky. 2006)). The emphasis of the rule is on whether the excluded portion should be introduced in fairness relative to what has already been introduced.

> In determining fairness, the issue is whether the meaning of the included portion is altered by the excluded portion. Accordingly, KRE 106 allows a party to introduce the remainder of a statement offered by an adverse party for the purpose of putting the statement in its proper context and avoiding a misleading impression.

Id. at 726 (internal citations and quotations omitted). Applied to the facts of this case, we cannot say the nature of the Commonwealth's presentation should have compelled the trial court to admit the remainder of the testimony on that basis alone. Nor are there any specific allegations from Betty as to how the admitted portions of the recording were potentially misleading without the excluded portions. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We discern no abuse of discretion.

Next, Betty contends the trial court abused its discretion by excluding proof her brother also received monetary benefits from being one of Ruth's children. Specifically, Betty attempted to introduce a document illustrating her brother, Tom Mutchman, collected farm subsidies on land owned by Ruth as evidence of Ruth's desire to provide for her children. The Commonwealth objected to the evidence, because it was not previously provided under reciprocal

discovery, and also on grounds of relevancy. The trial court agreed the document was irrelevant to whether Betty had exploited Ruth.

> Our Supreme Court has recently defined relevant evidence.
>
> > Evidence is relevant if it has "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." KRE 401. This test requires "only a slight increase in probability. . . ." *Harris v. Commonwealth*, 134 S.W.3d 603, 607 (Ky. 2004). A trial court's determination with respect to relevancy of evidence is reviewed under an abuse of discretion standard. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001).

Smith v. Commonwealth, 454 S.W.3d 283, 286 (Ky. 2015). Based on our review of the record, we cannot conclude the trial court abused its discretion in excluding the record of farm subsidies received by Tom Mutchman. These payments from a government agency are distinctly different in character from the charged conduct alleged against Betty. The trial court correctly held the evidence was irrelevant to the question of Betty's exploitation of Ruth.

Finally, Betty contends the trial court instructed the jury based on the language of KRS 209.990 prior to its amendment by the General Assembly in 2005. Because of this alleged error, Betty contends the instructions contained an extra element, whereby the jury was required to find she was functioning as a "caretaker" for Ruth. The alleged error is not preserved for review, but Betty requests palpable error review under RCr 10.26 and *Martin v. Commonwealth*, 409

S.W.3d 340, 346-47 (Ky. 2013).[10] Under the plain language of the rule, such review requires a finding of manifest injustice before relief may be granted. While the Commonwealth argues the error was not prejudicial, Betty believes the extraneous language defining her as a "caretaker" could have operated to her detriment, causing the jury to hold her to a higher standard.

Our Supreme Court has defined "manifest injustice" as a "defect in the proceeding [that] was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). Betty freely admitted she and her husband were Ruth's caretakers in her testimony. Furthermore, the allegedly erroneous instruction ostensibly aided Betty, as it required the Commonwealth to prove an extra element. "The additional elements could in no way prejudice [Betty], as the instructions required the jury to find that the Commonwealth proved each element of the offense beyond a reasonable doubt." *Lawson v. Commonwealth*, 53 S.W.3d 534, 547 (Ky. 2001). There was no manifest injustice as required by RCr 10.26, and thus, there could be no palpable error.

[10] *Martin* holds that while *omission* of an instruction requires preservation for appellate review pursuant to RCr 9.54, *erroneous* instructions may receive palpable error review under RCr 10.26.

CONCLUSION

For the foregoing reasons, the judgment of the Hancock Circuit Court is affirmed in part and vacated in part. The matter is remanded with direction to the trial court to amend the judgment in conformity with this Opinion.

KRAMER, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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