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RENDERED: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-13-08 ELLA GROWMAN D.C.

2007-SC-000612-MR

STEWART JOHNSON — APPELLANT

V.

ON APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 05-CR-00113

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Stewart Johnson of murder, and the trial court sentenced him in accordance with the jury's recommendation to twenty-five years' imprisonment. He appeals as a matter of right.[1]

Johnson contends that the trial court improperly limited his defense of self-defense at trial by (1) denying him the opportunity to present alleged statements from two witnesses about the victim's tendency to be a "mean drunk" and (2) refusing to allow him to pose a certain hypothetical question to a prosecution expert, which he alleges would have produced a response from the expert that the victim's actions toward Johnson were consistent with those of someone who had become violent as a result of intoxication. Because we

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[1] Ky. Const. § 110(2)(b).

find no reversible error in the trial court's handling of these evidentiary matters, we affirm.

I. FACTS.

Feeling bored one night, Johnson called an acquaintance, Jerry Dotson, who invited Johnson to his home for a social visit. Equipped with alcoholic beverages and guns, Johnson and Dotson repaired to an outbuilding at Dotson's place so they would not disturb Dotson's children, who were inside the house. Both men consumed various alcoholic beverages, and Dotson also used marijuana and cocaine that evening.

According to Johnson, after a pleasant evening of drinking and "man talk," Dotson suddenly turned violent and repeatedly attacked him without provocation. According to Johnson, Dotson grabbed his neck and belt, slammed his head into a wall, stomped him, tried to kick his face, pinned him to the floor, and then tried to choke him. Johnson stated that after his attempts to reason with Dotson failed, he warned Dotson that he would shoot. But Dotson's attacks persisted. In the course of escaping from Dotson, Johnson shot Dotson five times.

Hearing the commotion, Dotson's ex-wife, who lived with him, went out back to investigate. She found Dotson lying on the floor of the outbuilding, and she heard someone else warning her to go away. She could not see the speaker, but she could see through the open door a man's hands holding Dotson's radio. She called Dotson's father, who arrived in minutes to find Dotson dead on the floor of the outbuilding.

Meanwhile, Johnson had gone home. The next day, he was not surprised when the police came to question him. He immediately told police he had shot Dotson in self-defense, emptying the .40 caliber handgun he had carried with him to Dotson's home of its eleven bullets. He later claimed that he was so distraught during initial questioning by the police that he overestimated the number of shots fired in self-defense. He also claimed that police told him that Dotson's family had said that Dotson tended to be mean when drunk

Back at the outbuilding, police found a .22 near Dotson's body and a .357 under Dotson's body. Apparently, both of these guns belonged to Dotson. An autopsy revealed five gunshot wounds and the presence of a .22 bullet still inside Dotson's body. Testing revealed that the .22 bullet could not have come from the .22 found near the body.

Johnson admitted to owning a .22 semi-automatic weapon. According to him, this weapon was never subjected to testing. Police found spent .22 shells in Johnson's truck but no .22 casings at the scene of the shooting. Some .38 caliber bullets found in the area could have come from the .357 but could not have come from Johnson's .40 caliber handgun according to expert testimony. No bullets from a .40 caliber handgun were found. Autopsy results showed that Dotson had a blood alcohol level of .18 and confirmed that he had also ingested cocaine and marijuana.

Johnson wanted to present testimony at trial indicating that Dotson was a "mean drunk." When Dotson's ex-wife testified, defense counsel asked her on

cross-examination if she remembered telling police that Dotson became mean when drunk. She replied, "When he drank liquor, but he didn't drink." Defense counsel then directly asked her if Dotson was mean when he drank liquor, and she replied "no." Counsel then asked, "Did you tell the detectives that?" She answered, "I don't remember." No further discussion about any statements to officers on this subject occurred.

Similarly, defense counsel asked Dotson's father whether he told police Dotson became mean when he drank. Dotson's father stated he did not remember stating that. Counsel then asked whether he knew if his son used drugs. Dotson's father said, "I never did see him use any." Again, no further discussion about statements concerning whether Dotson was a so-called "mean drunk" occurred.

When Officer Veeneman (one of the investigating officers) testified, the defense asked if Officer Veeneman learned from family interviews that Dotson was violent when drinking liquor or if Officer Veeneman told Johnson of Dotson's reputation for violence when drinking. The Commonwealth objected to both questions, without stating grounds; and the trial court sustained both objections. But when Johnson later testified in his own behalf, he was permitted to state, without objection, that police mentioned Dotson's reputation for being a "bully" when drinking.

When the medical examiner testified concerning the autopsy results, defense counsel asked about the presence of alcohol and drugs in Dotson's blood and the potential effects of those substances on behavior. After

acknowledging the medical examiner's earlier testimony that individual character and experiences created different responses to alcohol, defense counsel asked, "Can you give us some idea of what makes somebody a mean drunk and somebody a happy drunk?" The medical examiner replied that it depended on the setting, as well as the person's psychological makeup. After explaining that the same person who might be depressed when drinking in one setting might be "the life of the party" when drinking in another setting, the medical examiner then stated that he simply could not predict how any particular individual would react to a certain level of drugs or alcohol on a particular occasion, even if he knew a lot of information about the individual's background.

Dr. Harry Plotnick, a toxicologist, also testified about potential effects of drugs and alcohol and testified that alcohol is a depressant and cocaine is a stimulant but that both can cause violent behavior. Defense counsel then asked Dr. Plotnick to assume certain facts with the following hypothetical question:

> I want you to assume, Doctor, that one particular evening two fellows are sitting around. They're talking and doing a little drinking and after they have been doing this for four or five hours one of the individuals grabs the other man by the belt and the neck and slammed him headfirst into a wall. The other guy then proceeds to start—when that guy falls to the ground the other individual starts to stomp him and kicking and saying he's going to kill him. He then gets on top of the fellow and proceeds to start to choke him. I want you to assume that the man being choked pulls a gun out of his pocket and fires two bullets into the other fellow, but that doesn't stop him. That doesn't stop this fellow from attacking him. And, it takes another two or three additional bullets before the man collapses. I want you to assume . . . .

The trial court then interrupted and asked counsel to approach the bench at which the following discussion occurred:

> BY THE COURT: I didn't think you would do that. You're putting it down and assuming facts—I don't know. I think a Toxicologist and testimony of an expert witness in Toxicology obviously had—if he assumes this individual and what effect would that have on his ability to physically ambulate and his thought processes and things of that nature I don't think he can actually interject—that would be a hypothetical. I don't think he can testify as to whether someone is violent or not because each person is different.
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> [DEFENSE COUNSEL]: I'm just asking him to assume.
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> BY THE COURT: I don't think—I'm not—the Court is not going to allow a hypothetical on that. If you assume the levels of cocaine—alcohol and cocaine levels and what effect that would have on this individual assuming this weight and this height I don't—I don't think there is anyway he can calculate as to self-defense. There are other factors that go into that. Dr. Hunsaker [the medical examiner] said even though you take an individual with that weight and height—I'm going to let him testify, but I'm not going to let him testify to that.
>
> [DEFENSE COUNSEL]: He is qualified to testify on that exact issue.
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> BY THE COURT: I don't think any court would allow him to testify to that.
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> . . . . [Seemingly unrelated remarks about gunshot wounds from Commonwealth Attorney]
>
> BY THE COURT: I'll let you testify as to the effects that he felt in his professional opinion that those levels had on this person. I don't think that he can just do that. I think the Court is being generous to allow him to testify to those things, but not to that.
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> [DEFENSE COUNSEL]: Judge, I wanted to ask him whether or not those actions were consistent.
>
> BY THE COURT: I think it comes back—it comes back to [Daubert] and gatekeeping. The Court is the gatekeeper. The Court is going to allow him to testify as to those levels and in his opinion what effect they would have on this gentleman in terms of

> his—a fight. I think he can testify whether he thinks this person would be violent or not.

Although the discussion is difficult to follow, given the use of "this" and "that" without further identification of issues, the trial court apparently refused to allow the expert to testify about whether Johnson had to act in self-defense or whether Dotson tended to be violent when drunk. The trial court stated it would allow the expert to testify about the effects that the victim's alcohol and drug levels would likely have on his behavior, however, particularly whether these levels might cause him to be violent. The court also mentioned its gatekeeping role under Daubert.[2]

Counsel then posed a different question, asking the witness to predict effects of a particular blood level of alcohol and cocaine on a man of Dotson's weight. The witness answered alcohol could "predominate," resulting in depression or violent behavior, or cocaine could "predominate," resulting in exhilaration or violent behavior. He also stated that the combination use of alcohol and cocaine was generally associated with more violent behavior than use of either substance by itself.

After the close of the evidence, the trial court instructed the jury to decide if Johnson was guilty of intentional murder. The trial court gave a self-defense instruction, but the jury was not instructed on any lesser-included offenses. Johnson does not complain about the substance of the jury instructions on appeal. Apparently rejecting his claims of self-defense, the jury

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[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 .Ed.2d 469 (1993).

found Johnson guilty of intentional murder and recommended a sentence of twenty-five years' imprisonment. The trial court entered judgment in accordance with the jury's verdict and this appeal followed.

II. ANALYSIS.

A. Trial Court Did Not Err in Excluding Alleged Prior Statements that Dotson was a "Mean Drunk," Given Lack of Proper Foundation.

We reject Johnson's argument that the trial court committed reversible error in excluding family members' alleged prior statements that Dotson was a mean drunk because Johnson failed to lay a proper foundation for these statements. When Dotson's father and ex-wife were asked whether they told police Dotson was mean when drunk, both stated they did not remember making such statements. Following that, Johnson failed to lay a proper foundation under Kentucky Rules of Evidence (KRE) 613, which demands that the "time, place, and persons present" be established when inquiring about a prior inconsistent statement.[3] Furthermore, Johnson failed to identify a particular police officer when questioning family members about "mean drunk"

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[3] KRE 613(a) states that:

"Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith."

Obviously, in the case at hand, the rule's requirements could not be excused by the witnesses' absence because they were present and testified.

statements allegedly made to police. Johnson's failure to identify the officer renders inapplicable our authority indicating that date and time might not be needed to establish an adequate foundation when the witness remembers having a conversation with a specified person.[4]

As for attempts to ask Officer Veeneman about family members' statements that Dotson was mean when drunk, we note that the Commonwealth's objection was sustained by the trial court without discussion before the witness answered. Given the complete lack of foundation concerning such alleged statements, we discern no error in the trial court's exclusion of these purported statements.[5]

B. No Reversible Error in Excluding Hypothetical Question Even Assuming Johnson's Allegations as Facts for Apparent Purpose of Showing Attack was "Consistent With Intoxication to Point of Violence."

Our review of Johnson's exclusion-of-hypothetical-question issue is hampered because counsel's question is incomplete, and the witness offered no

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4 *See* Kinser v. Commonwealth, 741 S.W.2d 648, 652 (Ky. 1987) (finding adequate foundation laid despite failure to ask about date and time where witness asked about and admitted having conversation with particular detective, yet denied making particular statement in that conversation); Noel v. Commonwealth, 76 S.W.3d 923, 930 (Ky. 2002) (noting Kinser as a narrow exception to strict foundational requirements of KRE 613(a)).

5 KRE 801A requires that a proper foundation be laid under KRE 613(a) before a witness can testify to a declarant's prior inconsistent statement as an exception to the hearsay rule:

"(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is: (1) Inconsistent with the declarant's testimony . . . ."

response to the incomplete question. The inadequacy of the record on this point is compounded by the lack of clarity in the discussion that followed the aborted hypothetical question. Essentially, defense counsel attempted to restate Johnson's version of the incident as the factual predicate to be followed by a question to the expert; but the trial court interrupted before counsel finished the question. Johnson contends in his brief that he was not allowed to ask the testifying toxicologist, Dr. Plotnick, whether Dotson's attack "was consistent with someone who was drunk to the point of violence." In the discussion at the bench, defense counsel did state he wanted to ask whether something was "consistent"; but the trial court's comments interrupted counsel before counsel disclosed what he wanted to show was consistent.

Although the discussion at the bench is not entirely clear to us, it appears that the trial court was concerned that defense counsel was trying to elicit an opinion that Dotson was a violent person and that Johnson had to act in self-defense. The trial court expressed concern that expert testimony in response to the interrupted question would not meet the standards of Daubert. We do not glean from the record that the trial court was opposed to the witness being asked a hypothetical question,[6] but we glean that the trial court was concerned about the type of conclusion the witness was being asked to make.

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6 Certainly, the assumed facts presented in the question were supported by evidence, namely Johnson's testimony; and there was not necessarily anything improper in defense counsel asking the witness to assume these facts in asking a hypothetical question. *See* Thomas v. Commonwealth, 170 S.W.3d 343, 352 (Ky. 2005) (stating that traditional rules dictating that assumptions in hypothetical questions should be supported by evidence have survived the adoption of the Kentucky Rules of Evidence). Rather, the perceived substance of the question itself (not the facts assumed to answer the question) seemed to trouble the trial court.

In fact, the trial court stated it would allow the witness to testify about possible effects of the specific alcohol and drug levels found in Dotson's blood for a person of his weight, specifically whether such levels could cause a person to become violent. In response to a new hypothetical question, the expert testified that either the alcohol or cocaine, alone or in combination, could lead to violent behavior.

Without a clearer record on this point, we simply cannot say that the trial court's actions amounted to error. We note that Johnson argues in his brief that he was stymied in his attempts to show that Dotson's alleged sudden violent behavior was consistent with extreme intoxication. Johnson contends the jury needed an explanation for Dotson's sudden violent attack to believe that Johnson acted in self-defense. Because Johnson testified that Dotson suddenly acted violently and because the expert testimony presented suggested the possibility that Dotson's alcohol and drug use could have led to violent behavior, Johnson's theory was essentially presented to the jury.

The jury apparently was not satisfied from the evidence that Johnson was privileged to act in self-defense. And since there appear to be facts in the record capable of influencing the jury to reject this defense—such as Johnson's failure to report the shooting to the police, waiting for police to locate him, and the discrepancy between his testimony about the weapons he used and those

recovered by the police—we find no reasonable possibility that his being unable to ask this hypothetical question was determinative.[7]

Because there is no indication that the trial court's handling of the hypothetical question confusion impaired Johnson's substantial rights, Johnson is not entitled to relief on this ground.[8]

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment.

All sitting. All concur.

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7 Anderson v. Commonwealth, 231 S.W.3d 117, 122 (Ky. 2007) (stating that erroneous evidentiary ruling is reversible error if it "has a reasonable possibility of contributing to the conviction; it is harmless if there is no reasonable possibility that it contributed to the conviction.").

8 RCr 9.24 ("No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.").

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