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DECEMBER 8, 2004 (2004-SC-0266-D)

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000157-MR

BRADFORD SCOTT WRIGHT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CR-001327

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Bradford Wright appeals from a judgment of the Jefferson Circuit Court, entered January 9, 2003, convicting him following a jury trial of second-degree manslaughter¹ and sentencing him to ten years' imprisonment. Wright contends that the trial court's exclusion of evidence pertaining to the

¹ KRS 507.040.

victim's likely alcohol consumption rendered the trial unfair. He also contends that he was entitled to a directed verdict of acquittal. We reject both of these contentions and affirm.

The Commonwealth accused Wright of murder for having fatally stabbed David Stayton during the early morning hours of May 24, 2001, in the parking area outside Red Eye's Bar on Minors Lane in Jefferson County. Although many of the details of the incident are disputed, the evidence established that on the evening of May 23, 2001, Wright's wife, Jo Ann, without informing Wright of her plans, took the family car to go to Red Eye's Bar and seriously damaged the car en route. A passing motorist gave her a ride to the bar, where she remained until approximately 1:00 or 1:30 the following morning. At that point Wright arrived at the bar and angrily and forcibly insisted that Jo Ann accompany him home. Wright had borrowed a friend's car and apparently was just then learning of the damage to his. A bartender and possibly others intervened and separated Wright from Jo Ann. A short time later, when Wright appeared to have calmed down, the bar's manager permitted the couple to leave.

A moment later, however, a patron announced to others in the bar that Wright was beating Jo Ann in the car. Several patrons rushed to the car where Wright was indeed slapping Jo Ann (Wright's version) or beating her more violently (the

version of several witnesses). An unidentified person opened the passenger door and pulled Jo Ann from the car.

At about the same time, Stayton and (possibly) one or two others, with several other persons not far behind them, opened the driver's door. According to those nearest the event, Wright almost immediately struck out at Stayton, who thereupon collapsed with a massive fatal stab wound to his throat. Others (meanwhile pushed past Stayton) and beat Wright briefly until they realized how seriously Stayton had been injured. The beating then stopped, and Wright drove away.

According to Wright, Stayton, who was about six-feet four-inches tall and weighed more than 250 pounds, pulled him from the car, and proceeded, along with three or four others to beat him. Fearing serious injury, he managed to unsheathe a knife he carried on the back of his belt and struck Stayton in the throat in an attempt to defend himself. Wright estimated that the beating lasted as long as thirty seconds. When it subsided, he hastened to his car and fled. The police found him at the emergency room of the University of Louisville Hospital where he was treated for an injured jaw and scalp lacerations.

The jury found Wright guilty of second-degree manslaughter under an instruction that provided in pertinent part as follows:

Even though the defendant might otherwise be guilty . . . if at the time the defendant killed David Stayton . . . he believed that David Stayton was then and there about to use physical force upon him, he was privileged to use such physical force against David Stayton as he believed to be necessary in order to protect himself against it, but including the right to use deadly physical force in so doing only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hands of David Stayton. . . .

Provided, . . . however, if you believe from the evidence beyond a reasonable doubt that the Defendant was mistaken in his belief that it was necessary to use physical force against David Stayton in self-protection, or in his belief in the degree of force necessary to protect himself, and . . . [t]hat when he killed David Stayton, he was aware of an[d] consciously disregarded a substantial and unjustifiable risk that he was mistaken in that belief, and that his disregard of that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation, then if you would otherwise find the Defendant guilty of Murder under Instruction No. 3, or First-Degree Manslaughter under Instruction No. 4, you shall not find him guilty of that offense, but shall instead find him guilty of Second-Degree Manslaughter under this Instruction.

Wright contends that he was entitled to a directed verdict of acquittal. As he correctly notes, in ruling on a motion for directed verdict,

the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume that the Commonwealth's evidence is true, leaving questions of weight and credibility to the

jury. If the evidence would induce a reasonable juror to believe that the defendant is guilty, the directed verdict motion should be denied. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id.²

The question then is whether it was clearly unreasonable for the jury to conclude, as it apparently did, that Wright's belief in the need to defend himself with deadly force was wantonly held; that is, that Wright formed the belief in conscious disregard of circumstances that made it substantially likely that the belief was false and that the belief constituted a gross deviation from what a reasonable person would have believed in the circumstances.

Although other evidence could be cited, the testimony by Christopher Hale, April Broughton, and Jonathan King, as well as the testimony by the medical examiner concerning the location of blood spatters inside the vehicle, permitted a finding that Stayton, who was about fifty years old and unarmed, was the person who opened Wright's car door and first contacted Wright either as he was still seated in the vehicle or as he first stood up in the door way. The jury could reasonably have found

² Slaughter v. Commonwealth, Ky. App., 45 S.W.3d 873, 875 (2000).

that the two grappled briefly, when Wright inflicted two incise wounds to Stayton's back, but that within a matter of moments and before any blows had been thrown, he delivered the fatal stab. Although Wright's situation was fearful, any belief at that point that he was being threatened with serious physical injury as opposed to being restrained, however roughly, even violently, from assaulting his wife, the jury could reasonably determine to have been wanton.³ The trial court did not err, therefore, by denying Wright's motions for a directed verdict.

Wright's primary contention is that the trial court erred by not permitting him to seek clarification of testimony by the medical examiner. The examiner testified that Stayton's blood-alcohol concentration at the time of death was 0.213. She also testified that his blood contained a low level of cocaine. Following her direct and cross-examination, a juror asked her how much alcohol Stayton would have had to drink to produce that blood-alcohol concentration. She qualified her answer by saying that a precise estimate would depend on many factors such as the person's height and weight and when in the metabolic process the blood sample had been taken, but then testified that for a 150-pound man there is a rule-of-thumb that each beer per hour

³ *Cf. Thomas v. Commonwealth, Ky.*, 412 S.W.2d 578 (1967) (Defendant's resort to a knife against an unarmed attacker was not justified.).

raises the blood-alcohol level by a factor of 0.015. "So, if you multiply that to get to two," she said, "around eight beers within an hour's time frame would get you to a level of about two."

Wright sought to follow-up this answer by asking the examiner whether a 250-pound man, such as Stayton, would need to drink substantially more than eight beers in an hour to achieve that same blood-alcohol level. The trial court disallowed the question, however, apparently because its policy was not to permit follow-up questions to testimony elicited by juror questions. The court did permit Wright to question the examiner by avowal. She agreed that a 250-pound man would need to drink more than eight beers, but she declined to say "substantially" more.

Wright contends that the trial court's exclusion of this follow-up questioning of the medical examiner denied him his constitutional right to confront the witness. Because Wright did not seek to impeach the examiner so much as to elicit testimony tending to establish his defense, it may be that the constitutional right at stake was his right to due process rather than his right to confront adverse witnesses.⁴ Be that as

⁴ United States v. Scheffer, 523 U.S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998); Rogers v. Commonwealth, Ky., 86 S.W.3d 29 (2002).

it may, we agree that the interest at stake for Wright is a fundamental one.⁵ On the other hand, it is also well established that trial courts enjoy broad discretion to limit cross-examination to relevant testimony that is neither confusing nor unduly redundant.⁶ The exercise of this discretion is particularly important in conjunction with KRE 614(c), which provides for juror questioning of witnesses.

Juror questioning is permitted because of the opportunity it affords to eliminate juror confusion, not because jurors should be routinely invited to serve as interrogators.⁷ As numerous other courts have noted, the practice of juror questioning is perilous to the delicate balances at play in our adversarial system of justice.⁸ Among the risks involved is the possibility that a juror question could alter the burden of proof by eliciting evidence of a fact it was the Commonwealth's burden to prove.

⁵ *Id.*; Barrett v. Commonwealth, Ky., 608 S.W.2d 374 (1980).

⁶ Delaware v. Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986); Commonwealth v. Maddox, Ky., 955 S.W.2d 718 (1997).

⁷ Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1987).

⁸ *See, for example, State v. Costello*, 646 N.W.2d 204 (Minn. 2002); United States v. Collins, 226 F.3d 457 (6th Cir. 2000). *See also*, Jonathan M. Purver, *Annotation, Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 ALR 3d 872 (1970).

It appears that the trial court in this case sought to guard against this possibility. The court required juror questions to be submitted in writing, and permitted the parties to object to them outside the hearing of the jury. Apparently the court also disallowed questions that pursued lines of inquiry not raised by the parties, allowing instead only questions that sought clarification of or elaboration upon the testimony already elicited. This seems to have been the basis for the court's policy of disallowing the parties to follow-up the juror questions with more questions of their own. Because the juror question would have elicited only clarification of prior testimony rather than new testimony, there would be no need to follow-up. We think the court's practice (if indeed that is what it was) of limiting juror questions to those seeking clarification of prior testimony was proper and calculated to accomplish the purpose of juror questioning—the elimination of confusion—while avoiding its potential to divert jurors from their role as neutral fact finders.

A blanket policy disallowing follow-up questions, however, does not serve those goals and runs the risk, as Wright contends, of encroaching upon the parties' rights to impeach adverse witnesses and to elicit testimony tending to establish the claim or defense. Those jurisdictions allowing juror questioning typically allow follow-up questions limited to the

subject matter of the juror's question and witness's answer.⁹ Such limited follow-up is not likely to add unduly to the proceedings and would permit clarification of a confusing response to a juror's question.¹⁰

We agree with Wright, therefore, that the trial court's blanket policy of disallowing follow-up questions to juror questions was erroneous and that he should have been permitted to ask the examiner whether Stayton, a heavier man, would likely have had to drink more than the hypothetical 150-pound man to achieve the same blood-alcohol concentration. We are convinced, however, that the error was harmless beyond a reasonable doubt and thus does not provide grounds for relief. The test here, where constitutional rights are implicated, is whether, had the disputed testimony been entered and its damaging potential fully realized, it is clear beyond a reasonable doubt that the outcome would not have been affected.¹¹

⁹ See Nicole L. Mott, *Symposium: The Jury at a Crossroad*, 78 Chicago-Kent Law Review 1099, 1104 (2003) ("Under most jury questioning guidelines, courts allow counsel to pose follow-up questions to the witness after a juror question is asked in court.")

¹⁰ Here, for example, the medical examiner apparently made an arithmetical mistake when she attempted to apply her rule-of-thumb formula. Had Wright noticed the apparent mistake at the time, a follow-up question to clarify the calculation would have been appropriate.

¹¹ Delaware v. Van Arsdall, *supra*; Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987).

There is virtually no doubt that the outcome would not have been affected even had Wright elicited from the medical examiner the testimony that Stayton would likely have had to consume more, even substantially more, than eight beers in an hour to achieve a blood-alcohol level of 0.213. This fact, as Wright made clear to the jury during closing argument, was evident already from the medical examiner's testimony. Wright was able to call the jury's attention to the examiner's likely mathematical mistake, and he emphasized that she had testified that Stayton weighed in excess of 250 pounds and that a heavier person would need to consume more beers than the 150-pound man upon whom the rule-of-thumb was based. The jury was duly apprised of the role of intoxicants in this tragic incident. Wright's follow-up question was essentially cumulative and would not have altered the result.

For this reason and because there was sufficient evidence of Wright's guilt to submit the case to the jury, we affirm the January 9, 2003, judgment of the Jefferson Circuit Court.

JOHNSON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS AND FILES SEPARATE OPINION.

McANULTY, JUDGE, CONCURRING: I agree with the majority that the trial court has the power to control or limit cross-examination. It is quite another thing to say that it is

appropriate to preclude it. Such practice should not be countenanced as compatible with either the right to confront or the right to due process. However, upon review of the evidence as a whole and the degree of punishment fixed by the verdict, I believe the presumption of prejudice is overcome by a determination that it was harmless error beyond a reasonable doubt. See Blake v. Commonwealth, Ky., 646 S.W.2d 718, 719 (1983).

Therefore, I concur.

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