

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001420-MR

KEVIN CLAXTON

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 04-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: The issues before the Court are whether the admission of a lay witness opinion and hearsay statements made during the trial rise to the level of palpable error and whether the trial court erred in failing to grant the defendant's motion for directed verdict. For the reasons set forth below, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

FACTS

Kevin Claxton (Kevin) was convicted in the Whitley Circuit Court of Assault in the First Degree of his wife Teresa Claxton (Teresa). and sentenced to fifteen-years in a correctional facility. This appeal followed.

The following are undisputed facts: Kevin and Teresa drank beer and moonshine and smoked marijuana at a friend's house on April 24, 2004. When it came time to leave, Kevin helped Teresa get into the car. He then drove to the couple's apartment. Upon arrival, Kevin went into the apartment and left Teresa, who was passed out, in the car. The testimony at trial varies as to what happened next. Regardless, at the end of the night, Teresa suffered multiple injuries which required hospitalization, and Kevin was arrested. The testimony dispositive to the issues herein is summarized in the order in which the witnesses testified at trial.

1. Deputy D. L. Foley

Deputy D. L. Foley (Deputy Foley) testified that he responded to a 911 call and found Teresa lying by a car outside an apartment. Her face was swollen and she was bruised. He noted blood on the car, the ground, the sidewalk, and Teresa. Kevin was inside the apartment.

Deputy Foley also testified regarding photographs he took of the scene; the EMT's attempts to intubate Teresa and suction blood from her lungs; cuts on Teresa's leg; the position of the car in relationship to the apartment; spots of blood on the sidewalk, car, and tire; and a broken car antenna.² Deputy Foley

² Twelve photographs depicting the above were admitted as exhibits and published to the jury.

said Kevin appeared to be under the influence because Kevin was unsteady on his feet and had slurred speech, a strong smell of alcohol, and bloodshot eyes.

However, Kevin did not say anything about drinking.

Kevin claims Deputy Foley improperly gave an opinion that Teresa's injuries could not have been caused by Teresa falling and that Teresa's injuries were severe. Deputy Foley testified that he had seen other people who had been injured in fights during his three years as a deputy. He then testified as follows:

Counsel:^[3] The area where she was laying was gravel there, wasn't it?

Deputy Foley: Yeah.

Counsel: Isn't it reasonable under the circumstances that [what] you saw there that the scratches and scuffs on her legs came from the gravel where she lay?

Deputy Foley: That'd be reasonable, I suppose.

...

Commonwealth:^[4] In light of that your Honor, the injuries that you saw—I know you're not a doctor, but you've seen a lot of—you've seen people hurt. Does that seem reasonable to you that that could have been caused by her falling one time?

Deputy Foley: Falling—no, I don't think that'd be reasonable, but those injuries she had don't come from falling one time.

Commonwealth: Any sort of fall?

³ Kevin's counsel asked the following questions on cross-examination.

⁴ The Commonwealth asked the following questions on redirect examination.

Deputy Foley: I'd say it'd be the same thing as if you'd trip and fall or whatever the reason causes you to fall—you can grab where you can receive injuries.

Commonwealth: But the injuries to her face . . .

Deputy Foley: No, this was severe injuries.

2. David Lay

Paramedic David Lay (Lay) testified that he responded to the 911 call and tended to Teresa. He testified that Teresa looked like her face had hit the concrete several times. Teresa was unresponsive and having difficulty breathing. Lay testified that his main priority was to stabilize Teresa and keep the blood out of her lungs because he was unable to intubate her due to swelling. Finally, Lay testified that being unresponsive is different from being intoxicated and passed out because an unresponsive person cannot be roused.

3. Sherry Bryant

Sherry Bryant (Bryant) testified that she lived in the apartment complex and was a neighbor of the Claxtons. Bryant's fiancé happened to be Kevin's father. While Bryant was sleeping, the telephone rang. Kevin's father answered the telephone and told Bryant it was Kevin. Bryant then looked out the window and saw Teresa lying in the parking lot. Bryant told Kevin's father to call 911, but he did not do so. Bryant then called 911.

4. Lenora Lanham

Lenora Lanham (Lanham) testified that she lived in the apartment complex and was a neighbor of the Claxtons. Lanham said she was getting ready

to go to bed when she heard someone arguing. She looked outside and saw Teresa lying on the ground by the car. Lanham testified she then saw Kevin slamming Teresa's head against the car and sidewalk like a football or basketball. Lanham, who did not have a phone, went to a neighbor's home to call 911.

5. Melissa Haun

Melissa Haun (Haun) testified that she was a nurse at the University of Tennessee Hospital. Haun identified her nurse's notes from April 27, 2004, and read them to the jury. The notes said that on the day Teresa was to be discharged, Teresa's mother called Haun into Teresa's room because Teresa was tearful about her looks.⁵ Teresa told Haun that her husband had caused her condition.

Haun testified that she did not have an independent recollection of what happened. However, she testified that she typically takes detailed notes to document everything that happens. Because she relies on her notes, Haun only writes down what actually happened.

On cross-examination, Haun testified that, if Teresa had said Kevin "beat" her, she would have written that. She would not have written that Teresa's husband "caused this." We note that Claxton's counsel reviewed Haun's notes prior to her testimony and made no objection to her testimony or to admission of the notes into evidence.

Teresa and her parents testified at trial that Teresa never made this statement while in the hospital.

⁵ Teresa was admitted to the University of Tennessee Hospital for three days.

6. Kevin Claxton

Kevin testified that he and Teresa drank by the river all day. They then went to a friend's house to purchase marijuana, which they smoked, and began drinking moonshine. He did not particularly remember the drive home; however, he did remember leaving Teresa, who was passed out, in the car and taking the moonshine into the apartment. When he went outside to get Teresa, he found the car door open and Teresa lying on the ground on the passenger side by the car wheel. Kevin then testified that, while he was still intoxicated, he picked Teresa up and dropped her, claiming he lost his balance. Kevin picked her up again and dropped her against the car and fell on top of her. Kevin tried to pick Teresa up for a third time, and they stumbled backward, breaking the antenna on the car against Teresa's back. Kevin further testified that he had no knowledge of how many times he picked Teresa up and dropped her; however, he ultimately stopped trying to pick Teresa up and decided to drag her to the house. This too failed and Kevin gave up, leaving Teresa lying in the parking lot. Finally, Kevin testified he never saw any blood and did not know the extent of Teresa's injuries due to his intoxication.

The jury found Kevin guilty of Assault in the First Degree. On appeal, Kevin argues that: (1) Deputy Foley's statements regarding causation of Teresa's injuries and the severity of those injuries were improper opinion testimony and are palpable error; (2) the admission of Teresa's statements identifying who caused her injuries through the testimony of Haun and

introduction of Haun's notes was hearsay and is palpable error; and (3) the circuit court erred in denying his motion for a directed verdict.

STANDARD OF REVIEW

Kevin did not object to admission of the contested evidence at the trial court level; therefore, this Court must determine if admission of that evidence rises to the level of palpable error. To be palpable, an error must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1998) *citing* BLACK'S LAW DICTIONARY (6th ed. 1995). A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005).

The second issue, whether the trial court erred in denying Kevin's motion for a directed verdict, will be reviewed under a different standard. When reviewing a jury verdict, the court is restricted to determining whether the trial court erred in failing to grant or in granting a directed verdict. The reviewing court must draw all reasonable inferences in favor of the movant, refrain from questioning the credibility of the movant, and refrain from assessing the weight which should be given to any particular item of evidence. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). The reviewing court may reverse the jury only when the verdict is so flagrantly against the weight of the evidence as to indicate passion or prejudice. *Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998). There must be a complete absence of proof on a material issue or no disputed issues on which reasonable minds could differ before a trial court should

remove a case from the hands of a jury. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985).

With these standards in mind, we will address the issues raised by Claxton.

ANALYSIS

As noted above, Kevin argues that the trial court erred in admitting certain evidence and in denying his motion for directed verdict. For the forgoing reasons, we disagree and affirm the circuit court's ruling.

1. Admission of Deputy Foley's Opinion Regarding Causation of Teresa's Injury and the Severity of her Injuries

Kevin argues that Deputy Foley's testimony that Teresa's injuries were severe and that she could not have received those injuries in a fall amount to inadmissible opinion testimony. Since an objection was not made at trial, we must determine if the admission of these statements rises to the level of palpable error. If it is not palpable error, we cannot disturb the jury's verdict.

The governing authority on the admissibility of lay witness testimony, Kentucky Rules of Evidence (KRE) 701, states

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness,
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Deputy Foley's statements were proper lay witness testimony because they meet the three requirements of KRE 701 as noted above. First, the statements were rationally based on Deputy Foley's perceptions, including the blood on Teresa, the car, sidewalk, and ground; the swelling of Teresa's face, eyes, and lips; Teresa's difficulty breathing; and the paramedics' attempts to intubate her and their need to suction blood from her lungs. From these perceptions, Deputy Foley opined that Teresa's injuries were not reasonably related to a fall and were severe.

Second, the statements were helpful to a clear understanding of Deputy Foley's testimony and the facts at issue. His statement explained the scene as he found it and what actions he and others took.

Finally, the statements were not based on scientific, technical, or other specialized knowledge within the scope of KRE 702.⁶ The statements were based on Deputy Foley's personal observations made at the scene and his past experience as a deputy. A lay person could have looked at Teresa's injuries and formulated an opinion based on his/her perception of the injuries, the scene, and knowledge of

⁶ KRE 702 states

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

what a fall in gravel looks like. In addition, a lay person could have looked at the pictures and seen Teresa's injuries and decided whether they were severe. These statements were not the product of scientific, technical, or other specialized knowledge.

Furthermore, Officer Foley's testimony was admissible because Kevin opened the door to this line of questioning, and Kevin cannot now complain that the Commonwealth walked through that door. The Supreme Court has held that

[i]t 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, 105-06 (Ky. 1999). When Kevin's counsel asked, "Isn't it reasonable under the circumstances that [what] you saw there that the scratches and scuffs on her legs, came from the gravel where she lay?," he opened the door to the Commonwealth's questions regarding the source of Teresa's injuries. If counsel had not asked about the causation of the injuries to Teresa's legs, then the Commonwealth may not have been permitted to ask about the causation of the injuries to Teresa's face. However, a party who first introduces incompetent evidence cannot complain of the subsequent admission of like evidence from the adverse party.

In summary, the admission of Deputy Foley's testimony was not error. However, even if an error occurred, it does not rise to the level of palpable

error. Sufficient evidence was introduced at trial, including the photographs of Teresa, the scene, and Lay's testimony, that Deputy Foley's opinion did not seriously affect the fairness of the proceedings. The jury could have come to the same conclusion from the other evidence presented.

2. Admission of Teresa's Statements through Haun's Notes

Kevin did not object to the admission of Haun's testimony or to the admission of her notes. Therefore, this Court must determine if the admission of that evidence rises to the level of palpable error. Having reviewed the record, we hold that it does not.

Kevin objects to the admission of Haun's statement that Teresa said her husband "caused this." As noted by Kevin's counsel, Teresa did not say Kevin beat or struck her, only that he caused this. That testimony, taken in context of the entire record, is as supportive of Kevin's theory of how Teresa was injured as it is of the Commonwealth's. The jury could have determined that the statement meant Kevin "caused this" by leaving Teresa in the car and dropping her several times while trying to get her into the house or by spending the day drinking and smoking marijuana with Teresa. Furthermore, in light of testimony from Teresa and her parents that the comment was not made, the jury could have discounted or completely ignored Haun's testimony and notes. Therefore, we hold that, even if admission of Haun's testimony and notes was error, it was not so grave that it seriously affected the fairness of the proceedings. Therefore, it did not rise to the level of palpable error.

3. Kevin's Motion for a Directed Verdict

Kevin argues the court erred in denying his motion for a directed verdict. Kevin was charged with Assault in the First Degree under KRS 508.010, which states in pertinent part:

(1) A person is guilty of assault in the first degree when:

- (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
- (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

Kevin claims the evidence was insufficient for reasonable jurors to believe beyond a reasonable doubt that Teresa received a serious physical injury; therefore, the court should have granted his directed verdict motion. Serious physical injury means “physical injury which creates a substantial risk of death . . .” KRS 500.080(15). For the forgoing reasons, we disagree with Kevin’s assessment of the evidence.

Kevin cites *Prince v. Commonwealth*, 576 S.W.2d 244 (Ky. App. 1978), to support his proposition that the Commonwealth failed to prove serious physical injury. In *Prince*, the Court held that “KRS 500.080(15) sets a fairly strict level of proof which must be met by sufficient evidence of injury, medical and/or

non-medical, taken as a whole, before an instruction on first-degree assault may be given.” *Id.* at 245. However, the Court also stated, “We are not prepared to hold that medical proof is an absolute requisite to prove serious physical injury.” *Id.*

The Supreme Court of Kentucky held in *Commonwealth v. Hocker*, 865 S.W.2d 323 (Ky. 1993), that,

[t]he jurors’ common sense obviously convinced them that there was indeed a substantial risk of death when the victim suffered from a skull fracture, hemorrhaging, and blood clotting which required a minimum of two days’ round-the-clock observation and monitoring in the intensive care unit, the highest degree of care a hospital can render.

Id. at 325. The Court further held, “[m]edical testimony is not an absolute requisite to establish serious physical injury or even physical injury.” *Id.*

The Commonwealth failed to provide direct medical testimony showing Teresa suffered serious physical injury. While it may have been better for the Commonwealth to provide such proof, the Commonwealth offered sufficient testimony to prove that Teresa suffered a serious physical injury. Lay testified that Teresa was having difficulty breathing; he had to suction blood from her lungs; and he could not intubate her because of swelling. While no evidence was provided regarding the treatment Teresa received during her three-day hospital stay, that testimony from Lay is sufficient to prove a serious physical injury. Therefore, the circuit court did not err in denying Kevin’s motion for a directed verdict.

Kevin cites *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977), in support of his argument; however, that case is easily distinguished from the case

herein. In *Luttrell*, a police officer was struck in the chest with a few pellets from a .38 caliber cartridge fired from a revolver, causing only superficial wounds. *Id.* at 77. The Supreme Court of Kentucky held that the officer's injuries were not serious as defined by statute. *Id.* at 79. Unlike in *Luttrell*, Teresa had difficult and impaired breathing, blood in her lungs, and her airway was blocked. That testimony was sufficient to meet the Commonwealth's burden of proving a serious or life threatening injury. Therefore, we hold the trial court did not err in denying Kevin's motion for a directed verdict.

CONCLUSION

Based on the above, we hold that the admission of the testimony of Deputy Foley was not error. Furthermore, the testimony of Haun, if error, did not rise to the level of palpable error, and the denial of Kevin's Motion for a Directed Verdict was proper. Therefore, we affirm the Whitley Circuit Court.

ALL CONCUR.

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