

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000181-MR

RANDELL SCOTT PHELPS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 14-CR-001662

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Randell Scott Phelps has appealed from the Jefferson Circuit Court's judgment of conviction and sentence following a jury trial on charges of burglary in the second degree¹ and being a persistent felony offender in the first degree² (PFO I). He alleges the trial court erred in limiting cross-examination of a

¹ Kentucky Revised Statutes (KRS) 511.030, a Class C felony.

² KRS 532.080.

witness and further abused its discretion in ruling on an alleged discovery violation. Following a careful review, we discern no error and affirm.

On January 15, 2014, Tina Taylor received a phone call from her mother-in-law, Pamela Taylor, telling her several items were missing from the Taylor house in Louisville, Kentucky. Tina went home to find her house had indeed been burglarized. Missing items included two televisions, a cell phone, three pairs of headphones, a computer router, two video game systems with several games, a Kindle Fire tablet, an Apple MacBook, a collector's edition University of Kentucky whiskey bottle, and Pamela's jewelry box. Tina began reviewing video recordings captured by her surveillance system while Pamela phoned the Louisville Metro Police Department (LMPD) to report the crime.

The video captured a red sports utility vehicle (SUV) driving past the home and a hooded man approaching the front door, knocking or ringing the bell, then entering the home. A short time later, the video recording ceased, presumably because the intruder unplugged the electrical power for the system. Tina provided copies of the video to police. In addition, she captured digital still photos from the recording, distributing them to local pawn shops and posting them to her Facebook page and other internet sites seeking assistance identifying the perpetrator or his vehicle.

The Facebook post generated a tip from a man who advised Tina the vehicle in the photos belonged to one of his neighbors, Belinda Hatfield. Hatfield lived in the home with her husband, Phelps. Tina relayed the information to

LMPD Detective Greg Bird who subsequently went to Hatfield's home to interview her regarding the burglary. Hatfield acknowledged the vehicle in the video was hers but denied any involvement in the crime. She identified Phelps as the hooded man captured on the surveillance video. Hatfield informed officers Phelps had come home on January 15, they were not getting along well at the time, and offered her a television and a collectible bottle of Maker's Mark in exchange for giving him a ride. A search of the residence and the red SUV uncovered none of the stolen property. Based on the results of the interview, Det. Bird obtained an arrest warrant for Phelps. With Tina's active assistance, Phelps was located and arrested in Bowling Green, Kentucky.

In the ten days prior to the scheduled jury trial, the Commonwealth supplemented its discovery filings several times to include copies of Tina's Facebook posts, documentation from a pawn shop, identifying a witness, and statements allegedly attributable to Phelps.³ On the morning of trial, Phelps requested exclusion of the proffered discovery because of the late timing. The trial court excluded portions of the tendered evidence, permitted introduction of other parts, and reserved ruling as to the remainder.

Following a four-day jury trial, Phelps was found guilty of the charged offenses and sentenced to ten years' imprisonment. This appeal followed. Additional pertinent facts will be set forth in our analysis as necessary.

³ The Commonwealth ultimately did not seek to introduce Phelps's statements and no challenge is raised to the trial court's ruling related to those statements in this appeal.

Before this Court, Phelps contends the trial court improperly limited his cross-examination of Hatfield which hampered his ability to reveal her potential bias to the jury. He further challenges the trial court's ruling on the Commonwealth's alleged discovery violation as arbitrary and an abuse of discretion. We disagree.

First, Phelps takes issue with the trial court's limiting his cross-examination of Hatfield. On cross-examination, Phelps elicited testimony from Hatfield about her status as a convicted felon. After Hatfield answered in the affirmative and confirmed she was currently on probation, Phelps inquired about potential consequences if she were to be charged in relation to the current burglary and convicted of another felony, at one point incorrectly referring to Hatfield as a "persistent felony offender." The Commonwealth objected to this line of questioning and a bench conference ensued. The trial court sustained the objection and prohibited Phelps from further examination on the matter, ruling the questions posed impermissibly called for Hatfield to testify as to a legal conclusion. The trial court indicated Phelps had shown Hatfield was a convicted felon and indicated it was "not going to allow you to go beyond that."

Phelps contends the trial court's ruling prevented him from fully and effectively cross-examining Hatfield on issues related to her bias and credibility. He argues the trial court stepped outside the permissible boundaries of setting appropriate limits on cross-examination and thereby abused its discretion. We disagree.

“An appellate court’s standard of review for admission of evidence is whether the trial court abused its discretion. The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Brewer v. Commonwealth*, 206 S.W.3d 313, 320 (Ky. 2006) (citations and internal quotation marks omitted). “The right to cross-examine witnesses is . . . an essential aspect of the Sixth Amendment Confrontation Clause . . . [b]ut that right is not absolute,” and “trial courts have broad discretion to impose reasonable limits[.]” *Newcomb v. Commonwealth*, 410 S.W.3d 63, 85 (Ky. 2013) (internal quotation marks and footnotes omitted).

Finally, the Supreme Court of Kentucky has provided the following guidance:

Limitations on cross-examination, including cross-examination to expose bias or prejudice, involve a fundamental constitutional right and should be cautiously applied. Nevertheless, so long as a reasonably complete picture of the witness’ veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.

Caudill v. Commonwealth, 120 S.W.3d 635, 661 (Ky. 2003) (citations and internal quotation marks omitted).

Despite Phelps’ arguments to the contrary, the jury heard a reasonably complete picture of Hatfield’s character, including her veracity, bias, and motivation. Phelps was permitted to adduce testimony regarding Hatfield’s status as a convicted felon, that she was on probation at the time of the burglary and at the time of trial, being charged with another crime would result in revocation of her probation and incarceration on a five-year sentence, any sentence

for a new felony conviction would run consecutively to the revoked sentence, and penalties for additional convictions would be increased due to her prior conviction. This is significantly more information than contemplated under KRE⁴ 609, which states, in pertinent part:

(a) General rule. For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

Phelps was clearly able to place substantial information regarding Hatfield's credibility before the jury. Given the amount of testimony already presented relating to her character, it was not unreasonable for the court to disallow Phelps' speculative questioning about what penalty Hatfield may have hoped to avoid.

“[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986)) (emphasis omitted). We hold

⁴ Kentucky Rules of Evidence.

the trial court did not abuse its discretion by terminating the aforementioned line of inquiry.

Next, Phelps alleges the trial court abused its discretion in prohibiting some of the Commonwealth's discovery items due to their late disclosure while permitting other items revealed at the same time. The late-disclosed information included a pawn ticket, Facebook posts made by the victim, statements allegedly attributable to Phelps and identification of a prosecutorial witness. While conceding rulings on evidence admissibility are within the trial court's discretion, Phelps argues the trial court's rulings were inconsistent, arbitrary and compromised his ability to prepare a defense. Phelps points us to no rule of law supportive of his position.

We have reviewed the record and discern no error. The excluded evidence—information about video games being pawned by Phelps on the day of the burglary—revealed incriminating documentary information that was readily available to the Commonwealth. The information had inexplicably not been sought by police until the eve of trial and only then at the suggestion of the prosecutor. Lack of knowledge of the contents of this documentation hampered Phelps' ability to adequately prepare his defense as the trial court correctly noted.

The challenged Facebook posts were cumulative at best. Phelps has not—and cannot—show how preparation of his defense was prejudiced in any way by introduction of screenshots taken from the victim's Facebook page which were so heavily redacted all that remained were photographs of the items taken from her

home and still photos pulled from surveillance videos. The Facebook posts were no more than visual representations of information contained in the Commonwealth's discovery since Phelps was indicted. No new information was disclosed in the posts. Further, Phelps acknowledged the cumulative nature of the evidence and made no contemporaneous objection when the Commonwealth moved for its introduction specifically saying she did not object to the screenshots. In the absence of a discovery violation, we fail to discern how the trial court's ruling related to the Facebook posts could have been erroneous.

Phelps' challenge to the trial court's failure to exclude witness testimony based on the late date of identification is without merit. Disclosure of prosecutorial witnesses is simply not required under the criminal rules governing discovery and inspection of evidence nor demands for production of statement and reports. *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009), *reh'g denied, certiorari denied* 130 S.Ct. 1879, 559 U.S. 1025, 176 L.Ed.2d 399. Thus, the trial court correctly denied Phelps the relief he sought.

Finally, we conclude there was no inconsistency in the trial court's ruling as Phelps contends. The trial court carefully examined each category of evidence independently before making its ruling related to that segment of the discovery. Our review reveals the trial court's decisions were correct as to each portion of the challenged evidence. As such, Phelps has failed to show an abuse of discretion or entitlement to relief.

For the foregoing reasons, the judgment of the Jefferson Circuit Court
is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bruce P. Hackett
Chief Appellate Defender

Cassandra F. Kennedy
Assistant Appellate Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky