

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000336-MR

LEONARD JAMES MELTON

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 16-CR-00216

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Leonard James Melton brings this appeal from a January 18, 2017, final judgment and sentence of imprisonment adjudicating him guilty of operating a motor vehicle while under the influence of alcohol and operating on a suspended or revoked operator's license and sentencing Melton to five-years' imprisonment. We affirm.

On February 7, 2016, Officer Ben Fleury was on duty as a patrolman for the Owensboro Police Department. At approximately 12:45 a.m., Officer

Fleury encountered a vehicle he believed was being driven by Leonard Melton. Officer Fleury suspected Melton's driver's license had been suspended, so he ran the license plate number. The search revealed the vehicle was registered to Melton, and his driver's license was suspended. Based upon this information, Officer Fleury initiated a traffic stop of Melton's vehicle. As he approached the vehicle, Officer Fleury immediately detected the odor of alcohol.

Officer Fleury asked Melton to exit the vehicle, and Melton complied. Officer Fleury then proceeded to conduct several field sobriety tests upon Melton. Officer Fleury believed Melton's performance indicated he was impaired. Melton initially denied drinking any alcohol but eventually admitted to having four or five beers earlier in the day and to taking pain medication approximately an hour and a half earlier. Based upon the totality of the circumstances, Officer Fleury concluded that Melton was under the influence and placed him under arrest. Officer Fleury transported Melton to the Daviess County Detention Center. After arriving at the Detention Center, Officer Fleury read Melton the implied consent warning and requested that Melton submit to a breathalyzer test. Melton refused.

Melton was subsequently indicted by the Daviess County Grand Jury upon the offenses of operating a motor vehicle while under the influence of alcohol (DUI), fourth or subsequent offense, aggravating circumstance, and operating on a suspended or revoked operator's license. Melton entered a plea of not guilty.

Following a jury trial, Melton was found guilty of the indicted offenses and was sentenced to five-years' imprisonment. This appeal follows.

Melton contends the circuit court erred by denying his motion *in limine* for a missing evidence instruction. Melton specifically contends he was entitled to a missing evidence instruction because the Commonwealth failed to produce the video recording of him upon his arrival at the Detention Center. Melton asserts the video recording contained exculpatory evidence demonstrating his sobriety. Melton also points out that the Detention Center failed to retain the video recording in violation of Kentucky Revised Statutes (KRS) 189A.100.¹

A missing evidence instruction is intended “to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence.” *Greene v. Commonwealth*, 244 S.W.3d 128, 137 (Ky. App. 2008) (quoting *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002)). However, the due process clause is implicated only where the failure to collect or preserve “the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed.” *Estep*, 64 S.W.3d at 810. Therefore, in the absence of “some degree of ‘bad faith,’” a missing evidence

¹ Kentucky Revised Statutes 189A.100 provides that law enforcement agencies may record or videotape sobriety tests administered at a jail under certain circumstances. If such a video recording is made, KRS 189A.100 requires that it be retained for at least fourteen months.

instruction should not be given to the jury. *Id.* at 810; *see also Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013).

In the case *sub judice*, Melton's trial counsel filed a motion *in limine* requesting a missing evidence instruction. The Commonwealth responded, and a hearing was conducted. At the hearing, Melton asserted the missing video recording made upon his arrival at the Detention Center contained exculpatory evidence tending to demonstrate his sobriety. Melton also pointed out that the video recording made at the Detention Center was not retained for fourteen months as required by KRS 189A.100. A deputy jailer was called to testify at the hearing. The deputy testified regarding the video recording system in place at the Detention Center when Melton was arrested. The deputy jailer explained that the video recording system only stored recordings for fourteen days, and after that the video recordings were recorded over. The deputy jailer further testified that since Melton's arrest the Detention Center's recording system had been upgraded and was currently capable of storing video recording for sixty days. The deputy expressed concern that the upgrades to the equipment necessary to ensure compliance with KRS 189A.100 would be cost prohibitive.

Although it is disconcerting that the Detention Center's equipment was not in compliance with KRS 189A.100, Melton has failed to demonstrate the failure to preserve the video recording was intentional and that the potentially

exculpatory nature of the evidence was apparent. Absent a showing of some degree of bad faith, Melton was not entitled to missing evidence instruction. *See Estep*, 64 S.W.3d 805. Therefore, the trial court did not err by refusing to give the jury a missing evidence instruction regarding the video recording made upon Melton's arrival at the Detention Center.

Melton also asserts the trial court committed reversible error by restricting the scope of the defense's cross-examination of Officer Fleury during trial. Melton asserts he should have been permitted to cross-examine Officer Fleury at trial regarding his knowledge of the video recording made at the Detention Center. Although the trial court denied Melton's motion *in limine* seeking a missing evidence instruction, Melton asserts he was nevertheless entitled to explore, comment upon, and argue inferences to the jury from the Commonwealth's failure to collect or preserve the video recording made at the Detention Center.

At this juncture, it should be emphasized that defense counsel was allowed to cross-examine a deputy jailer at the hearing upon his entitlement to a missing evidence instruction. However, at trial, the court limited defense counsel's cross-examination of Officer Fleury and concluded that defense counsel could not ask any questions concerning the existence of the missing video recording.

The preservation of an alleged error by the trial court excluding evidence is governed by Kentucky Rules of Evidence (KRE) 103. KRE 103 provides that an error may not be based upon the exclusion of evidence unless the substantial right of a party is affected and “[i]f the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” KRE 103(a)(2). The application of KRE 103(a)(2) to the exclusion of evidence was examined by the Kentucky Supreme Court in *Henderson v. Commonwealth*, 438 S.W.3d 335 (Ky. 2014). The *Henderson* Court explained that although KRE 103(a)(2) does not mandate “a formal offer of proof, it does require an indication of ‘the facts sought to be elicited or the specific facts the witness would establish.’” *Id.* at 342 (citation omitted). And, particularly relevant to the case *sub judice*, counsel must establish more than the general subject matter of the evidence; rather, counsel is required to provide “an indication of the substance of the evidence.” *Id.* at 342 (citation omitted).

In this case, the following events transpired at trial. During cross-examination by the defense, Officer Fleury stated Melton had refused to submit to a breathalyzer test upon his arrival at the Detention Center. Thereafter, defense counsel asked Officer Fleury if Melton’s arrival at the Detention Center had been recorded. The Commonwealth objected, and a bench conference ensued. At the

bench conference, defense counsel explained that her question to Officer Fleury did not relate to the missing evidence instruction. Rather, defense counsel argued she was entitled to ask Officer Fleury if he knew whether Melton's arrival at the Detention Center was video recorded. Although the trial court had denied defense counsel's request for a missing evidence instruction, counsel maintained that case law entitled her to explore, comment upon, or argue inferences from the failure to preserve the video recording. Defense counsel also noted that Officer Fleury had previously worked as a deputy jailer for seven years and should have some knowledge regarding the video recordings made at the Detention Center. But, defense counsel admitted that she did not know how Officer Fleury would answer.

Although we are sympathetic to Melton's argument that the Detention Center violated KRS 189A.100, we are constrained to conclude that Melton failed to satisfy the standard set forth in *Henderson*, 438 S.W.3d 335. At the bench conference, defense counsel did not identify the specific facts Officer Fleury's testimony would establish. Absent a sufficient offer of proof, we are prevented from reviewing the alleged error. *See id.*

For the foregoing reasons, the final judgment and sentence of imprisonment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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