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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000187-MR

WALTER WILLIAMS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NOS. 16-CR-00787 AND 17-CR-00978

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND LAMBERT, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

BUCKINGHAM, SPECIAL JUDGE: Walter Williams appeals from a judgment of the Kenton Circuit Court sentencing him to ten-years' imprisonment following a jury trial finding him guilty of several criminal offenses. We affirm.

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

FACTS

In the early afternoon of July 2, 2016, at 2015 Greenup Street in Covington, Kentucky, Lillian Ballman and her husband, Gary Ballman, were sitting at a table near the back door of their home having coffee when two men entered through the door and demanded pills and money. Both men were wearing hoodies and masks and had guns. Ms. Ballman tried to yank the mask off the smaller of the men, and the other one then struck Mr. Ballman with the gun and fired a shot.

Ms. Ballman's two-year-old granddaughter came down the stairs, and the smaller man then picked her up and carried her upstairs, followed by Mr. Ballman. Mr. Ballman's brother, Timmy Ballman, who had been sleeping on the couch, awoke and saw the smaller man with the granddaughter. He was ordered to go upstairs as well.

Meanwhile, Ms. Ballman and the other man were fighting, and the man struck her several times, resulting in her arm being broken. After another shot was fired, Mr. Ballman gave the men a safe containing 80 Percocet pills and 80 Xanax pills as well as some cash and jewelry. Once the men had the safe, they left the premises, and Ms. Ballman called 911.

The police responded at around 1:00 p.m. Ms. Ballman's daughter-in-law, Carrie Carpenter, came home while the police were there, and she was

questioned concerning her potential involvement in the invasion. Carpenter told the police that Ms. Ballman had been selling her pills and that Ms. Ballman receives 120 Percocet pills and sells them for $15 each. She also related that Williams had been at the home earlier that day trying to buy pills from Ms. Ballman. Carpenter was arrested after police found drugs and a syringe in her room and determined that those items were accessible to her two-year-old daughter.

Ms. Ballman was taken to the hospital where the police continued to question her. She told them she sold pills to Williams, but she later said that was a lie. She stated she knew Williams but that he was too small to be one of the robbers. Later, Ms. Ballman changed her story and said Williams was one of the two men who invaded her home.

Around 4:00 that afternoon, Covington police responded to a report that a person was lying on the ground unresponsive at 521 Oliver Street, which was about six blocks from the location of the home invasion at the Ballman residence. Officer Kyle Shepherd, one of the officers who responded to the call, found Williams passed out in the doorway of the garage. Officer Shepherd also found marijuana, eleven Percocet pills, six Xanax pills, a scale, clothing, and a firearm within arm's length of Williams.

Officer Shepherd awoke Williams, who was intoxicated, and read him his *Miranda*[2] rights. Williams admitted the marijuana was his, but he denied ownership of the pills, which he said were not Percocet. He said the gun was a family heirloom, but he later said he purchased it on Craigslist.

Police arrested Williams and placed him in the back seat of the cruiser. He passed out again, and an ambulance was called. Williams was transported to the hospital where he received medical care for approximately two hours. After Williams regained consciousness at the hospital, Officer Shepherd again read him his *Miranda* rights and questioned him further.

During the trial, the Commonwealth presented testimony from a firearms and toolmark examiner that a bullet found in the upstairs closet door at the Ballman residence came from the gun found in Williams's possession. There was also testimony that gunshot residue was found on the clothes lying near Williams when he was arrested, but none was found on his hands.

Williams's defense argued at trial that Ms. Ballman had lied about Williams being involved in the incident because police kept harassing her and threatening her until she changed her story and said he was involved. Additionally, Williams requested a *Daubert*[3] hearing regarding the testimony of the

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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

Commonwealth's firearms expert, but the court denied the motion. During the trial, defense counsel cross-examined the Commonwealth's expert witness concerning his findings and conclusions.

The jury found Williams guilty of first-degree burglary,[4] first-degree robbery,[5] first-degree possession of a controlled substance,[6] third-degree possession of a controlled substance,[7] and possession of marijuana,[8] and recommended the minimum sentence of ten years, which the court imposed. This appeal by Williams followed.

RIGHT TO *DAUBERT* HEARING

Williams's first argument is that the trial court erred in not granting his motion for a *Daubert* hearing on the admissibility of the testimony of the Commonwealth's firearms and toolmark expert, Stephen Hughes. KRE[9] 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or

[4] Kentucky Revised Statutes (KRS) 511.020, a Class B felony.

[5] KRS 515.020, a Class B felony.

[6] KRS 218A.1415, a Class D felony punishable by a term of up to three years' imprisonment.

[7] KRS 218A.1417, a Class A misdemeanor.

[8] KRS 218A.1422, a Class B misdemeanor punishable by a maximum term of 45 days' incarceration.

[9] Kentucky Rules of Evidence.

> 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 this case.

In support of his argument, Williams cites *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky. 1999). In *Johnson* our Supreme Court spoke of a court's taking judicial notice of scientific tests as follows:

> [I]n *United States v. Martinez*, 3 F.3d 1191, 1197 (8th Cir. 1993), *cert. denied*, 510 U.S. 1062, 114 S. Ct. 734, 126 L. Ed. 2d 697 (1994), it was held that once an appropriate appellate court holds that the *Daubert* test of reliability is satisfied, lower courts can take judicial notice of the reliability and validity of the scientific method, technique or theory at issue. Courts are "right to admit or exclude much evidence without 'reinventing the wheel' every time by requiring the parties to put on full demonstrations of the validity or invalidity of methods or techniques that have been scrutinized well enough in prior decisions to warrant taking judicial notice of their status."

Id. at 261 (quoting 3 C. MUELLER AND L. KIRKPATRICK, FEDERAL EVIDENCE § 353, at 657 (2d ed. 1994)). Our Supreme Court in *Johnson* further stated:

> However, judicial notice does not preclude proof to the contrary. . . . Thus, the fact that a particular scientific method, technique or theory was once deemed

> scientifically reliable does not preclude subsequent proof that it is no longer deemed reliable. In this respect, however, judicial notice relieves the proponent of the evidence from the obligation to prove in court that which has been previously accepted as fact by the appropriate appellate court. It shifts to the opponent of the evidence the burden to prove to the satisfaction of the trial judge that such evidence is no longer deemed reliable. The proponent may either rest on the judicially noticed fact or introduce extrinsic evidence as additional support or in rebuttal.

Id. at 262 (footnotes omitted).

Also, our Supreme Court held in *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002), as follows:

> When faced with a proffer of expert testimony under KRE 702, the trial judge's task is to determine "whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." This calls upon the trial court to assess whether the proffered testimony is both relevant and reliable. This assessment does not require a court to hold a hearing on the admissibility of the expert's testimony. But a trial court should only rule on the admissibility of expert testimony without first holding a hearing when the record [before it] is complete enough to measure the proffered testimony against the proper standards of reliability and relevance.
>
> Usually, the record upon which a trial court can make an admissibility decision without a hearing will consist of the proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like.

Id. at 488-89 (citations and internal quotation marks omitted).

Williams argues that a report generated by The President's Counsel of Advisors on Science and Technology (PCAST), Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (September 20, 2016), is proof that the testing by an expert witness concerning bullet comparison should no longer be deemed reliable and that the trial court should have held a *Daubert* hearing. Further, Williams argues that the bullet in this case was damaged. He asserts he was entitled to a *Daubert* hearing based on these grounds.

In further support of his argument, Williams cites *United States v. Tibbs*, No. 2016-CF1-19431, 2019 WL 4359486 (D.C. Super. Ct. Sept. 5, 2019) (Trial Order), a trial court decision. In that case, the trial court held extensive hearings and rendered a lengthy opinion that a witness's testimony regarding bullet comparison should be limited to the extent the witness may only testify that the recovered firearm cannot be excluded as the source of the cartridge casing found at the scene of the shooting in that case. Williams contends *Tibbs* supports his argument that a reasonable trial judge could have determined, after a *Daubert* hearing, that the testimony offered by the Commonwealth's expert witness should have been limited or excluded.

Although *Tibbs* was a very thorough opinion, we do not give it much credence as authority. First, it is an opinion of a trial court in a case that is

apparently nonfinal and has not been subject to appellate review. Second, following the trial court's ruling in *Tibbs*, the District of Columbia Court of Appeals rendered *Williams v. United States*, 210 A.3d 734 (D.C. 2019), the effect of which the *Tibbs* court conceded "seems a bit unclear."[10] *Tibbs*, 2019 WL 4359486 at *24. Third, we look first to Kentucky case law to determine whether the trial court in this case erred by not granting a hearing.

In *Garrett v. Commonwealth*, 534 S.W.3d 217 (Ky. 2017), our Supreme Court stated the issue before it as follows: "Garrett suggests, as a general matter, that an opinion from a firearm and toolmark examiner that a particular bullet was fired from a particular gun should no longer be admissible in criminal trials in Kentucky." *Id*. at 221. That is the exact same issue that the trial court faced in this case less than a year after our Supreme Court rendered its opinion in *Garrett*.[11]

The trial court in *Garrett* conducted a *Daubert* hearing and held that the testimony of both the Commonwealth's expert witness and the defendant's expert witness was admissible. *Id*. The appellant argued on appeal that an opinion from a firearms and toolmark expert that a particular bullet was fired from a

[10] In *Williams*, the District of Columbia Court of Appeals held that "it is plainly error to allow a firearms and toolmark examiner to unqualifiedly opine, based on pattern matching, that a specific bullet was fired by a specific gun." 210 A.3d at 744.

[11] *Garrett* was rendered in December 2017, and the trial in this case took place in November 2018.

particular gun should no longer be admissible in criminal trials in Kentucky and that the testimony of the Commonwealth's witness should have been excluded. *Id*.

Our Supreme Court first noted that "ballistics testimony has been allowed by this Court since at least 1948." *Id*. (citing *Morris v. Commonwealth*, 306 Ky. 349, 208 S.W.2d 58 (1948)). The Court then held that the testimony of the expert was admissible under *Daubert* criteria. *Id*. at 222-23.

Our Supreme Court has accepted the reliability and validity of ballistic testing, such as that in *Garrett* and in this case, and the trial court here properly took judicial notice of its reliability and validity. *Johnson*, 12 S.W.3d at 262. The Commonwealth was not required "to put on full demonstrations of the validity or invalidity of methods or techniques that have been scrutinized well enough in prior decisions to warrant taking judicial notice of their status." *Id*. at 261. Therefore, the court was within its discretion in not granting Williams a full-blown *Daubert* hearing. And, according to *Christie*, a court may forego a hearing concerning the admissibility of expert witness testimony "when the record [before it] is complete enough to measure the proffered testimony against the proper standards of reliability and relevance." *Christie*, 98 S.W.3d at 488 (citation omitted).

Nevertheless, while Williams was not entitled to a full-blown *Daubert* hearing, he was entitled to present "proof to the contrary" on the issue of the

continued reliability of bullet comparison testing method in light of the PCAST Report. He did so in his motion to exclude the ballistics evidence by citing the PCAST report that had been issued on September 20, 2016. Rather than granting a hearing, however, the trial court rejected the motion and its supporting PCAST Report and allowed Hughes's testimony.

While our Supreme Court in *Garrett* did not reference the PCAST Report, it is noteworthy that the PCAST Report was dated September 20, 2016, and the *Garrett* decision was rendered in December 2017. Under these circumstances, we conclude the trial court decision to deny Williams a *Daubert* hearing was neither clear error nor an abuse of discretion.[12] As in *Garrett*, the proper avenue for Williams to have addressed his concerns about the methodology and reliability of the expert witness's testimony was through cross-examination as well as testimony from his own expert witness. *Garrett*, 534 S.W.3d at 223.[13]

MOTION TO SUPPRESS

Williams next argues that the trial court committed reversible error when it denied his motion to suppress statements he made to the police following his arrest. When the police responded to the call, they found Williams passed out.

[12] "Th[e] Court reviews a trial court's ruling on the admissibility of expert testimony for an abuse of discretion unless the challenge is to the trial court's findings of fact regarding the *Daubert* factors, which we review for clear error." *Garrett*, 534 S.W.3d at 221 (citation omitted).

[13] Williams also challenged the gunshot residue testimony at trial, but he has mentioned it only in passing in his brief. Thus, we decline to address it.

Officer Shepherd testified that when he awoke Williams, Williams was intoxicated and lethargic. He further testified that Williams became more coherent as they continued their conversation.

Officer Shepherd also testified that he read Williams his *Miranda* rights and that Williams seemed to understand them. Officer Shepherd stated that no one at the scene ever raised his voice or threatened Williams in any manner.[14] When questioned about the items found beside him, Williams stated the gun was a family heirloom and the marijuana, clothes, and cigarettes belonged to him. When Officer Shepherd asked if Williams knew what the pills were, he answered they were not Percocet. Also, Officer Shepherd's bodycam video was played at the suppression hearing for the trial court's consideration.

Williams argues that the trial court erred in denying his suppression motion because his statements were given while he was intoxicated and not in sufficient possession of his faculties to give a reliable statement, he was not asked if he understood his rights, and he did not explicitly agree to speak with the officers.

In reviewing a trial court's ruling on a motion to suppress evidence, the reviewing court must first determine whether the trial court's findings of fact are supported by substantial evidence. If so, those findings are conclusive. The

[14] Williams has not argued that his statements were coerced.

reviewing court must then "conduct a *de novo* review of the trial court's application of the law to the facts[.]" *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015) (quoting *Payton v. Commonwealth*, 327 S.W.3d 468, 471-72 (Ky. 2010)); *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); CR[15] 52.01; RCr[16] 13.04.

"In determining the voluntariness of statements obtained from an intoxicated defendant, 'the basic question is whether the confessor was in sufficient possession of his faculties to give a reliable statement[.]'" *Nichols v. Commonwealth*, 142 S.W.3d 683, 691-92 (Ky. 2004) (quoting *Britt v. Commonwealth*, 512 S.W.2d 496, 500 (Ky. 1974)).

Also, in *Bartley v. Commonwealth*, 445 S.W.3d 1 (Ky. 2014), our Supreme Court held:

> The giving of Miranda warnings and an uncoerced statement must also be accomplished by a showing that the accused understood these rights. However, [a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford. This is how an accused impliedly waives her rights.

Id. at 13. (citations and internal quotation marks omitted).

[15] Kentucky Rules of Civil Procedure.

[16] Kentucky Rules of Criminal Procedure.

We conclude there was substantial evidence to support the trial court's denial of Williams's motion to suppress his statements to the police. There was no evidence of coercion, and Williams gave statements voluntarily. Further, there was testimony that his level of intoxication was not such that he was not in possession of his faculties. Although Williams was not asked if he understood his rights, Officer Shepherd testified that Williams appeared to understand them. Further, although Williams never explicitly agree to speak with the officers, his actions indicated he made a choice to do so. *Bartley*, *supra*.

ADMISSIBILITY OF RECORDING OF LILLIAN BALLMAN

Williams next argues that he was not given the right to present a meaningful defense when he was not allowed to show a recording of police threatening Ms. Ballman and trying to get her to say Williams was involved in the robbery.

Williams's defense was that Ms. Ballman lied when she testified he was involved in the robbery. During Ms. Ballman's testimony, the defense wanted to show the audiovisual recording of her interaction with the police. Ms. Ballman admitted during her testimony that the police had threatened her and tried to get her to say Williams was involved. She admitted she repeatedly told police Williams was not involved and admitted officers threatened to take her daughter-in-law to jail and remove her granddaughter from the home. Williams argues the

trial court erred and deprived him of a meaningful defense by not allowing the jury to see the recording that depicted the police threatening Ms. Ballman.

Under the United States Constitution and the Kentucky Constitution, an accused has a right to present a complete and meaningful defense. *Brown v. Commonwealth*, 313 S.W.3d 577, 624-25 (Ky. 2010). "An exclusion of evidence will almost invariably be declared unconstitutional when it significantly undermine[s] fundamental elements of the defendant's defense." *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-07 (Ky. 2003) (citation and internal quotation marks omitted), *abrogated on other grounds by Geary v. Commonwealth*, 490 S.W.3d 354 (Ky. 2016). However, "the defendant's interest in the challenged evidence must be weighed against the interest the evidentiary rule is meant to serve, and only if application of the rule would be arbitrary in the particular case or disproportionate to the state's legitimate interest must the rule bow to the defendant's right." *McPherson v. Commonwealth*, 360 S.W.3d 207, 214 (Ky. 2012) (citations omitted).

Furthermore, when the exclusion of evidence does not significantly undermine fundamental elements of the defendant's defense, a trial court has the discretion to exclude evidence to ensure the fairness of a trial; and "its determination will not be overturned on appeal in the absence of a showing of an

abuse of such discretion." *Mullins v. Commonwealth*, 956 S.W.2d 210, 213 (Ky. 1997) (citation omitted).

Here, the trial court excluded the evidence stating that the officer's statements could be introduced through the officer but not through Ms. Ballman because they would be hearsay. Ms. Ballman testified on cross-examination that she was threatened by the officers concerning Williams's involvement in the robbery. Further, she specifically testified she told the officers Williams was not involved. In addition, one of the police officers testified that Ms. Ballman repeatedly denied Williams's involvement.

We believe the trial court erred in not granting Williams's motion to admit the recording into evidence. The evidence was admissible for the nonhearsay purpose of showing the threatening nature of the interrogation. *See Jenkins v. Commonwealth*, 308 S.W.3d 704, 713 (Ky. 2010). However, Ms. Ballman's earlier denial that Williams was involved was presented to the jury by her testimony, as were her allegations that she was threatened, and we conclude any error in this regard was harmless. RCr 9.24.

DENIAL OF MISTRIAL MOTION

Williams's last argument is that the trial court erred in denying his motion for a mistrial. Following the jury's retiring to deliberate, it was discovered that a dismissed charge against Williams for possession of a stolen handgun was

written on an evidence bag, and that this evidence bag was in close proximity to and facing the jury. When this fact was brought to the court's attention, Williams moved the court to grant a mistrial. Determining that the marking was hard to see and that it was difficult to focus on it from the jury box, the court denied the motion.

In order for a mistrial to be granted, the record must reveal a manifest necessity for a mistrial before such an extraordinary remedy will be granted. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). "The error must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way[.]" *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). The appellate court's review of the trial court's denial of a motion for a mistrial is for abuse of discretion. *Id*.

We are not persuaded there was a manifest necessity for a mistrial simply because the jury may have seen the writing on the evidence bag. We conclude the trial court did not abuse its discretion in denying Williams's motion for a mistrial.

CONCLUSION

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky