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RENDERED: JANUARY 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0263-MR

BRADLEY BOGGESS — APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
1999-CR-0207

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Bradley Boggess, was convicted by a Graves Circuit Court jury of wanton murder and first-degree wanton endangerment. Appellant was sentenced to twenty years' imprisonment and five years' imprisonment, respectively. He appeals to this Court as a matter of right. We affirm.

On the afternoon of November 14, 1999, the car driven by Appellant collided head-on with the car driven by Gary Brown. Appellant's car was in Mr. Brown's driving lane when the collision occurred. As a result of the crash, Mr. Brown was killed, Appellant was severely injured, and Mrs. Brown, a passenger, was also injured. At the hospital, a sample of Appellant's blood was taken, according to routine procedure

following a serious accident. The lab results indicated the presence of several drugs, including marijuana and methamphetamine. Based on this evidence and accident reconstruction evidence, the Commonwealth prosecuted Appellant on the charges for which he was subsequently convicted. On appeal, Boggess makes four claims of error: (1) the trial court should have suppressed the testimony of the treating ER physician because he was not an expert in toxicology and his testimony was admittedly inconclusive; (2) the trial court should have granted a mistrial because of the prosecutor's drug-related questioning of defense witnesses; (3) the trial court should not have admitted the Commonwealth's accident reconstruction evidence; and (4) the "ultimate issue" testimony by the accident reconstructionist was improper.

I. Testimony of the treating ER physician concerning Appellant's blood test results

After the crash, Appellant was taken to Jackson Purchase Medical Center, where he was treated for his severe injuries. As part of his treatment, he gave a blood sample, which later tested positive for marijuana (THC), methamphetamine, and two different sedatives. Dr. Gerald Russell, an emergency room physician at the Medical Center, treated Appellant. Prior to trial, both the prosecutor and defense counsel deposed Dr. Russell. The deposition was videotaped and later played for the jury. At the deposition, Dr. Russell testified about his medical examination of Appellant. He testified that Appellant did not appear intoxicated or in any way impaired by drugs or alcohol during the examination. Dr. Russell's notes from the examination indicated that "the patient [Appellant] is alert and appropriately response [sic] here in the Emergency Room, . . ." In fact, the hospital staff accepted Appellant's informed consent to the medical procedures, apparently without question. The majority of Dr. Russell's

testimony, however, concerned his interpretation of the blood test results. It is the admissibility of this testimony that Appellant disputes.

Dr. Russell testified as to the quantity of each drug found in Appellant's blood, as well as the minimum detection limit for each drug: 1392 nanograms/milliliter amphetamine (100 ng/ml minimum), 923 ml/ng oxazepam (200 ng/ml minimum), 1008 ng/ml nordiazepam (200 ng/ml minimum). Appellant also tested positive for THC, but the test did not indicate the amount of the drug in his blood. The most the doctor could say about the drug levels was that they were "significantly positive." But Dr. Russell offered no proof as to the foundation of this conclusion.

Dr. Russell testified about the effects of each drug, in isolation. He further testified concerning the half-life of each drug, explaining that the drugs can be detected in a blood test after the impairment to the individual has largely ceased. But due to the numerous variables that affect the analysis (e.g., purity of the drug, whether Appellant was a habitual user, Appellant's percentage of body fat, Appellant's metabolic rate), Dr. Russell was unable to testify as to the precise effect the various drugs would have had on Appellant's physical functioning at the time of the accident:

> Prosecutor: As a doctor, in looking at [the drug levels] in someone's blood, how is that affecting Mr. Boggess's body at the time?
>
> Dr. Russell: It's hard to pin it down, to be honest with you. [Describes general effects of amphetamines and sedatives, individually.] To give you a specific example of what he'd be like, I'd have to know Mr. Boggess better and know whether he was a chronic user or not. But it's going to alter [his] ability to think clearly. It's going to alter [his] ability to think rationally.

The difficulty in analyzing Appellant's blood test results was created by the fact that a person could ingest a drug one day and test positive for it up to several days

later, while the physical impairment may or may not persist to the subsequent days. This difficulty was exacerbated by the fact that Appellant tested positive for several drugs and each of these drugs is detectable for several days – or, in the case of THC, several months – after ingestion. Defense counsel highlighted this difficulty on cross-examination:

> Defense Counsel: Would he still be affected by it mentally when he wakes up that morning [after taking methamphetamines the night before]?
>
> Dr. Russell: If it's detectable, I would have to say probably yes. Now, would he be affected in a tremendous amount? Certainly not like he was when he was acutely high, no, but some effect, possibly.
>
> Defense: But again, you would agree that that would be speculation upon your part?
>
> Dr. Russell: Correct.

Defense counsel filed a motion to suppress Dr. Russell's testimony about the blood test results because Dr. Russell could not conclusively testify that Appellant was under the influence at the time of the collision. Counsel claimed the testimony and blood test results were substantially more prejudicial than probative, in violation of KRE 403. Counsel also made a motion for a Daubert hearing concerning Dr. Russell's testimony and its admissibility under Goodyear. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000). The record of the hearing was not included on this appeal, but it appears the hearing was held. The trial court ultimately denied Appellant's motion to suppress the testimony.

We announced the standard for admitting expert opinion evidence in Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied 523 U.S. 1052, 118 S. Ct.

1374, 140 L. Ed. 2d 522 (1998). Such evidence is admissible so long as "(1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of Daubert, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702." Id. at 891 (internal citation omitted). Appellant challenges the admissibility of Dr. Russell's testimony on all four Stringer factors. After performing the Stringer analysis, we hold that the trial court did not abuse its discretion in admitting the testimony.

A. Expert's Qualifications

In evaluating whether the expert is qualified, "Kentucky's case law clearly indicates that the decision required of the trial judge is to determine if an expert has 'adequate' rather than 'outstanding' qualifications." Lawson, The Kentucky Evidence Law Handbook, § 6.15 (3d ed.). And, with respect to medical experts, "a general practitioner usually may testify as to medical problems that a specialist might treat in a clinical setting." Wright and Gold, Federal Practice and Procedure: Evidence, § 6265 (citing cases). The decision as to the qualifications of an expert rests within the discretion of the trial judge. Ford v. Commonwealth, Ky., 665 S.W.2d 304, 309 (1983), cert. denied, 469 U.S. 984, 105 S. Ct. 392, 83 L. Ed. 2d 325 (1984).

Dr. Russell completed medical school and a three-year residency program. He has ten years of experience as a practicing physician, the majority of that time spent in emergency care. While Dr. Russell has no additional training in pharmacology or toxicology, he is certainly familiar with pharmacology as a result of his medical school training and extensive clinical experience. Dr. Russell did not have "outstanding" qualifications to testify about Appellant's blood test results – specifically the effect those

drugs had on Appellant's physical functioning – but he did have "adequate" qualifications. See Lauria v. AMTRAK, 145 F.3d 593, 596-97 (3d. Cir 1998) (abuse of discretion to exclude testimony because expert is not the best qualified); see also Quinton v. Farmland Industries, Inc., 928 F.2d 335, 337 (10th Cir. 1991) (doctor of veterinary medicine was properly permitted to testify regarding the toxic effects of substances on dairy cows even though he was not a specialist in toxicology) and Cree v. Hatcher, 969 F.2d 34, 38-39 fn. 5 (3d Cir. 1992), cert. dismissed, 506 U.S. 1017, 113 S. Ct. 1147, 121 L. Ed. 2d 577. ("The fact that a doctor is not a specialist in a particular field goes not to the admissibility of the opinion but rather to the weight that the jury may wish to place upon it.") The trial court did not abuse its discretion by permitting Dr. Russell to testify as an expert witness.

B. Daubert requirements

Prior to the start of trial, Appellant moved for a Daubert hearing to determine if the expert testimony was proper. The trial court determined that Dr. Russell's testimony satisfied the requirements of Daubert, although the basis for that opinion is not clear from the record before us. Appellant contests the trial court's finding. Specifically, Appellant claims that because Dr. Russell's conclusion was "speculation," the "reasoning and methodology" upon which his testimony was based is unreliable, in violation of Goodyear. Appellant's argument is misguided. The reasoning and methodology upon which Dr. Russell's testimony was based was the blood test results. Blood tests for drug detection have been used as evidence in numerous cases and we decline to invalidate such evidence in this case in the absence of a convincing argument. Appellant suggests no reason – and we are aware of no reason – why the blood test results do not comply with the "reasoning and methodology" factors we

adopted in Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995), and approved of in Goodyear.

C. Probativeness compared to prejudice

The third Stringer factor requires that "the subject matter satisf[y] the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403." Dr. Russell's testimony about Appellant's blood test results was clearly relevant to the issue of Appellant's intoxication at the time of the accident. The closer question is whether the probativeness was substantially outweighed by undue prejudice.

Dr. Russell's testimony about the amount of drugs in Appellant's blood and the effect those drugs likely had on Appellant was probative of whether Appellant was under the influence at the time of the accident. Dr. Russell testified to the amount of the drugs and to the general effect the different drugs have individually. He testified that the drug levels were substantially positive. He testified that based on his expert opinion, Appellant was impaired to some extent at the time of the accident. Dr. Russell's testimony, however, was also prejudicial to the defendant. Evidence that the defendant had four different drugs in his blood – two of which are illicit – at the time of the accident would undoubtedly inflame the presentiments of the jury.

We examined a similar scenario in Bush v. Commonwealth, Ky., 839 S.W.2d 550 (1992). In Bush, the defendant was also charged with wanton murder resulting from an automobile collision. A blood test revealed that Bush had a BAC of .13% but the test did not detect the presence of any drugs. A urine test, on the other hand, detected marijuana and amphetamines. The trial court permitted a chemist to testify as to both the alcohol and drug evidence even though the chemist could not testify as to

when the defendant ingested the drugs or whether the defendant was impaired by them. Bush appealed the drug evidence and this Court affirmed the trial court's decision to admit the evidence, concluding that "if it was error to admit this testimony, it was harmless." Id. at 555. In a dissenting opinion, Justice Leibson argued what Appellant argues in the present case: that even if the drug evidence was relevant, it was substantially more prejudicial than probative. But the present case can be distinguished from Bush on two important grounds. First, unlike in Bush, the drugs were found in Appellant's blood, not solely in his urine. This fact strengthens the inference of intoxication. Second, and more importantly, based on the drug test results, the expert in this case was able to declare his belief that Appellant was impaired as a result of the drugs.

The Supreme Court of Florida also addressed similar issues in State v. McClain, 525 So. 2d 420 (Fla. 1988). In McClain the defendant was charged with vehicular manslaughter while intoxicated. McClain's blood test revealed a BAC of .14% and a trace of cocaine. The chemist was unable to testify whether the trace of cocaine could have affected McClain's driving and the trial court granted the defendant's motion to suppress the testimony, finding the prejudice substantially outweighed the probative value. In a cogent analysis of Florida Rule 403, the Court upheld the trial court's decision to suppress the evidence because of its limited probative value: "[I]t is clear that the probative value of the evidence of cocaine in McClain's blood was minimal. The amount of the cocaine was so small that the chemist could express no opinion with respect to whether it would have had any effect at all upon McCain's driving." Id. at 422. Again, the evidence in the present case was more than a trace and it was

sufficient for Dr. Russell to reach a conclusion, albeit an indefinite one, that Appellant was impaired.

Appellant argues that our decision in Estep v. Commonwealth, Ky., 957 S.W.2d 191 (1997), aids his cause. In Estep, the defendant was also charged with wanton murder after a fatal car crash because there was evidence that she was intoxicated. In addition to a urinalysis report indicating the presence of marijuana, there was other evidence of intoxication: a blood test showed that Estep had consumed five different prescription drugs (mostly sedatives), a nurse found numerous prescription drugs in Estep's purse, Estep appeared "pretty zonked" at the hospital after the accident, and Estep testified that she occasionally smoked marijuana. Estep tried to suppress the urinalysis report. The trial court admitted the report and we affirmed. Appellant claims that we approved of the admission of the urinalysis report because in that case there was "so much evidence other than the lab report regarding Estep's intoxication." We disagree that Estep supports Appellant's case. Justice Wintersheimer summarized the majority's reasoning approving of the introduction of the urinalysis report, but then concluded that the blood test alone was sufficient to sustain the conviction:

> In the circumstances presented here in which there was sufficient evidence that five different types of drugs were found in the [blood] system of the accused and that there was evidence that the effects of each of these substances would cause impairment in the operation of a motor vehicle, a jury could reasonably find that wanton murder had occurred.

Id. at 194. With the exception of the number of drugs found in Appellant's blood, the same could be said of this case. Despite the limitations of Dr. Russell's testimony, we discern no fault with the trial court's finding that the probative value of the testimony exceeded any undue prejudice.

D. KRE 702

Appellant's argument that Dr. Russell's testimony was speculation addresses admissibility not only under KRE 403 but under KRE 702 as well. The final Stringer factor requires the trial court to determine whether the opinion will assist the trier of fact per KRE 702. Professors Wright and Gold discuss this very point and conclude that indefiniteness is not enough to exclude an expert's opinion:

> Courts generally also defer to the jury's ability to weigh the evidence where an expert's opinion is equivocal. For example, an expert may give an opinion that there is a causational link between defendant's activities and plaintiff's injuries, but the expert may be unable to state the opinion with a high or even reasonable degree of medical certainty. In such a case, most courts will admit the opinion while permitting cross-examination to reveal for the trier of fact the expert's uncertainties. . . .

Wright and Gold, Federal Practice and Procedure: Evidence, § 6264 (citing cases). That is precisely the case we are presented with here. Dr. Russell could not state his opinion with a high degree of medical certainty and this uncertainty was revealed to the trier of fact on cross-examination. Even though defense counsel questioned Dr. Russell whether his testimony was "speculation," and Dr. Russell conceded that it was, it is clear from the totality of the testimony that Dr. Russell believed that Appellant was impaired to some extent and the "speculation" only extended to the amount of the impairment. For example, Dr. Russell testified: "As a general rule, if it's detectable by these drug screens, it would have some influence. Now how much influence is debatable, but it would certainly have some." And later on he testified: "At this level [of drugs in Appellant's blood], I would have to say probably [he was under the influence]. Now, it depends on how you define 'under the influence.' Again, would he be staggering drunk? Not necessarily." In Baylis v. Lourdes Hosp., Inc., Ky., 805 S.W.2d

122, 124 (1991), we addressed the degree of probability and the wording of expert testimony: "While evidence of causation must be in terms of probability rather than mere possibility, we have held that substance should prevail over form and that the total meaning, rather than a word-by-word construction, should be the focus of the inquiry." Furthermore, this is not a case of "rank speculation." Wright and Gold, Federal Practice and Procedure: Evidence, § 6264 (citing cases) ("But courts will reject expert testimony where it is based on rank speculation."). In short, the limitations of Dr. Russell's testimony go to the weight and not the admissibility of the evidence. To conclude, we cannot say the trial court abused its discretion in admitting Dr. Russell's testimony.

II. Prosecutor's questioning of defense witnesses concerning drug-related activity

Prior to trial, Appellant was charged with manufacturing methamphetamines, as mentioned above. Appellant's step-father was also arrested for manufacturing methamphetamines as a result of the investigation into Appellant's activities. The charges against Appellant were severed from the present charges. During cross-examination of two defense witnesses, the prosecutor asked questions related to drug use and drug manufacture. Defense counsel objected to both instances and the trial court sustained. Appellant claims both interrogations by the Commonwealth were improper.

Ronnie Grissom testified that he had known Appellant all his life and that the two were just like brothers. He testified that he and Appellant had met that day, prior to the collision, and he was following Appellant in his own vehicle immediately before the collision. On cross-examination, the prosecutor asked Mr. Grissom if he ever did drugs with Appellant. Grissom answered affirmatively as defense counsel simultaneously

objected. After a bench conference, the trial court sustained the objection and admonished the jury.

The prosecutor's question was permissible. Appellant's blood tested positive for four drugs, two of which were illicit. Whether or not Grissom had done drugs with Appellant – especially on the day of the accident – would assist the jury to determine if Appellant was under the influence at the time of the accident. In addition, the prosecutor's question did not mention drug manufacturing so such inquiry could not inflame the jury with respect to those charges. Even though we find no error in the prosecutor's questioning, the trial court's admonition would have resolved any perceived impropriety.

Appellant's mother, Margie Cantrell, also testified on Appellant's behalf. She testified that Appellant lived in a trailer on her property. She further testified that she saw Appellant on the day of the accident and that he did not appear to be under the influence of any drugs. On cross-examination, the following exchange took place:

> Prosecutor: Do you have any experience in . . . being around people who are under the influence of methamphetamines?
>
> Cantrell: No.
>
> Prosecutor: Has anyone in your family been arrested for manufacturing methamphetamines?
>
> Defense: Objection.
>
> Court: Sustained.

Moments after this exchange, the trial court held an in camera conference with counsel. The court warned the prosecutor to discontinue this line of questioning or a mistrial would result. Defense counsel then requested a mistrial but that request was denied. Appellant argues that the trial court erred in denying his motion for a mistrial.

In order to grant a mistrial, "there must appear in the record a manifest necessity for such action." Turpin v. Commonwealth, Ky., 780 S.W.2d 619, 621 (1989). On appellate review, the trial judge is the person best situated to properly evaluate whether a mistrial is required. Kirkland v. Commonwealth, Ky., 53 S.W.3d 71 (2001). After reviewing the record, we find no error in the trial court's decision to deny the motion. While the prosecutor's interrogation flirted with eliciting improper testimony, there was an impeachment basis for the question. Also, the manufacturing methamphetamine question could have referred to the witness's husband, Appellant's stepfather, as the family member who was arrested for manufacturing methamphetamine. These two factors suggest that the prosecutor was not blatantly flouting the trial court's mandate against that line of questioning. Most importantly to our analysis, the witness offered no answer to the question and defense counsel's objection was sustained.

III. Accident reconstruction evidence

As part of its investigation of the automobile collision, the police employed Kentucky State Police troopers Barry Meadows and Chris Anderson. These troopers are trained in accident reconstruction and, employing their special knowledge, they estimated the speed at which the Boggess vehicle was traveling at the time of the crash. Appellant claims the troopers' testimony was speculative and should not have been admitted.

Trooper Meadows testified that he used an in-line momentum equation to attempt to determine the speed of Appellant's vehicle. Based on this formula, Meadows ultimately concluded that Appellant was traveling at 104 mph before braking. According to the testimony, that formula has three input variables: (1) the angle of the approach of the two vehicles, (2) the speed before the collision of the second vehicle

(Brown), and (3) the braking efficiency of the vehicle whose speed is being estimated (Boggess). Appellant claims that the officers improperly arrived at figures for the second and third variables.

There is no requirement in the Kentucky Rules of Evidence that expert testimony must be dependent solely on admissible evidence. To the contrary, as Professor Lawson notes, we made it clear in Buckler v. Commonwealth, Ky., 541 S.W.2d 935 (1976), that "experts can rely upon some types of inadmissible evidence when testifying to otherwise admissible opinion." Lawson, Evidence, § 6.15. And in fact, KRE 703 explicitly permits experts to base their testimony on inadmissible evidence. But KRE 703 does require the evidence to be "of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, . . ." The reason for such a requirement, of course, is to ensure that the evidence is reliable.

Mrs. Brown testified that she could not remember the events that occurred in the car after she and her husband drove away from the Wal-Mart where they stopped just prior to the accident. Therefore, contrary to the erroneous assertion by the Commonwealth in its brief, Mrs. Brown could not offer her eyewitness testimony as to the speed of the vehicle. But she also testified that her husband earned his living as a licensed truck driver. Because his livelihood depended on maintaining his license, and because speeding tickets could result in losing his license, he almost always drove between 45 and 55 miles per hour. Based on this testimony, Trooper Meadows reliance on Mrs. Brown's testimony was reasonable. The reliability of the testimony is bolstered by the following facts: (1) Mr. Brown was an experienced driver; (2) he was familiar with the road he was driving; (3) his vehicle left no skid marks; and (4) his vehicle forced Appellant's vehicle backward after the collision. Although Alexander v.

Swearer, Ky., 642 S.W.2d 896 (1982) and Wells v. Conley, Ky., 384 S.W.2d 496 (1964), make clear that expert opinions may not be based on assumptions, those opinions warn against assumptions not supported by the evidence. See Citizens State Bank v. Seaboard System R.R., Inc., Ky. App., 803 S.W.2d 585, 587 (1991). As discussed, Trooper Meadows' approximation of the Brown vehicle's speed was founded on the evidence. Trooper Meadows also testified that, in the absence of other physical evidence such as skid marks or a needle slap (which occurs when the speedometer needle leaves an impression on the casing at the moment of impact, thereby recording the speed), it is customary in the industry for accident reconstructionists to use personal testimony to approximate speed.

As to the second variable under scrutiny, the braking efficiency of Appellant's vehicle, Trooper Meadows used 30%. He testified that Appellant's vehicle left but one skid mark. He testified that occasionally a sliding car will leave a "shadow" skid mark that lingers for a short time after the accident and then fades away. This kind of shadow mark would indicate that the other tires had also locked upon braking. Meadows arrived at the accident within a couple of hours afterward and he was unable to detect a shadow. Based on this evidence, he concluded that the brakes in only one wheel of Appellant's car had functioned properly. According to the reconstruction literature, 30% braking efficiency was the proper value to use in the formula when only one brake functioned. Based on our discussion of the Rules and the case law, supra, Trooper Meadows adequately supported the figure he used.

With both of these issues, any shortcomings go to the weight and not the admissibility of the evidence. And the shortcomings were well explored by defense counsel. On cross-examination, counsel planted seeds of doubt in the jurors' minds

concerning Trooper Meadows' methodology and conclusions. More importantly, a well-qualified, expert accident reconstructionist testified on Appellant's behalf. Not only did he point out flaws in the prosecution's case, but he also provided an alternative conclusion. Retired Officer Crawford testified that, because of the limited evidence available, he was unable to derive a single speed for Appellant's car. But he suggested a range from mid-seventy mph to upper-eighty mph prior to braking. And again, we note that the decision to admit expert testimony is a decision left to the sound discretion of the trial court. While we may have reached a different conclusion with respect to Trooper Meadows' testimony, we cannot say that the trial court abused its discretion.

IV. "Ultimate issue" testimony of the accident reconstructionist

Appellant's final argument is that Trooper Meadows gave impermissible "ultimate issue" testimony regarding Appellant's guilt. Trooper Meadows testified as follows:

> Prosecutor: Your job is to determine, is it not, what you believe, in your expert opinion, what happened?
>
> Meadows: Yes, sir.
>
> Prosecutor: And, if it turned out that in your opinion, this was accidental, in terms of there was no criminal conduct, you wouldn't have asked that charges be brought?
>
> Meadows: We wouldn't be here today.

Appellant claims this testimony invaded the province of the jury; however, there was no objection to this testimony at trial. Unpreserved error is only grounds for reversal if the appellant can show that absent the error, "the reviewing court must conclude that a substantial possibility exists that the result would have been different." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

While certainly not beyond debate, Trooper Meadows' testimony appears to be ultimate issue testimony. The jury instructions permitted the jury to convict Appellant of wanton murder if it found that Appellant operated his vehicle "at an excessive rate of speed and/or while . . . under the influence . . . ." If believed, Trooper Meadows' testimony established the former. But after our opinion in Stringer, 956 S.W.2d 883, it is clear that such ultimate issue testimony is no longer inadmissible per se. Although the testimony likely would not assist the trier of fact, as required by Stringer, it does not rise to the level of palpable error and, hence, does not warrant reversal.

For the foregoing reasons, the decision of the Graves Circuit Court is affirmed.

Lambert, C.J.; Johnstone, Keller, and Wintersheimer, JJ., concur. Cooper, dissents by separate opinion, with Graves and Stumbo, JJ., joining that dissent.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE COOPER

The Commonwealth presented the testimony of two accident reconstruction experts, Trooper Chris Anderson and Trooper Barry Meadows. Both opined that Appellant's vehicle was traveling at a speed of 104 miles per hour (m.p.h.) immediately prior to the fatal collision. That figure was arrived at by employment of an "in-line linear momentum equation," a formula that required underlying knowledge of (1) the "brake effect" of Appellant's vehicle, (2) the respective weights of the two vehicles, and (3) the speed of the victim's (Brown's) vehicle. Trooper Meadows obtained the underlying information and Trooper Anderson "did the math" with a hand-held calculator. Based solely on the fact that Appellant's vehicle left only one skid mark, Meadows concluded that only one wheel was braking and, thus, that the "brake effect" was 30%. He then contacted Dennis Crawford, Appellant's accident reconstruction expert, and obtained

information that Appellant's Chevrolet Camaro weighed 3,600 pounds and the Browns' Lincoln Town Car weighed 4,471 pounds. Since the Brown vehicle left no skid marks, Meadows could not determine its speed by using a coefficient of friction. Mr. Brown was deceased and Mrs. Brown had no memory of the accident or the events leading up to it. Nor were there any eyewitnesses.

Thus, Meadows "assigned" a speed of 50 m.p.h. to the Brown vehicle based on information obtained from Mrs. Brown during an out-of-court interview that her husband's "habit" was to drive at a rate of speed of 45 to 55 m.p.h. In fact, Mrs. Brown, herself, testified later in the trial that, while she did not know how fast her husband was driving at the time of the collision, he usually drove "around 55, maybe sometimes he would hit 60," but no faster, because he was a truck driver and could lose his commercial driver's license if convicted of speeding. Thus, the assumption as to the speed of the Brown vehicle used by Anderson to calculate the speed of Appellant's vehicle was contradicted by Mrs. Brown's own trial testimony.

In addition to this contradiction, there are three other major problems with respect to Anderson's and Meadows' opinions as to the speed of Appellant's vehicle immediately prior to impact.

I.

First, Mrs. Brown's out-of-court statement to Meadows with respect to her husband's driving habit was hearsay.[1] While an expert can base his opinion on

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[1] Both Anderson and Meadows testified before Mrs. Brown testified, so their repetition of her out-of-court statement was not then admissible as a prior inconsistent statement. This precludes any necessity to consider the propriety of calculating Appellant's speed on the basis of Mrs. Brown's prior inconsistent statement rather than her sworn testimony at trial.

hearsay, he cannot relate that hearsay to the jury until and unless the trial judge has made a determination that the evidence is "trustworthy, necessary to illuminate testimony, and unprivileged" and, if requested, has "admonish[ed] the jury to use such [evidence] only for the purpose of evaluating the validity and probative value of the expert's opinion or inference." KRE 703(b); Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 11 (1998). Here, the trial judge did neither.

II.

Second, the trial judge could not have made a KRE 703(b) determination that Mrs. Brown's hearsay statement as to her husband's "habit" was "trustworthy" because, today, in the case of Burchett v. Commonwealth, Ky., ___ S.W.3d ___ (2003), the majority of this Court, in an opinion penned by the same author who wrote the majority opinion in this case, has reaffirmed that Kentucky will remain the only jurisdiction in the United States that considers evidence of habit too unreliable to be used as evidence at trial. While I disagree with that ruling, id. at ___-___ (Cooper, J., dissenting), if such is to remain the law of this Commonwealth, the appellant in this case is just as entitled as the appellant in Burchett to have that law applied to his case. Logical consistency, not to mention due process of law, precludes us from admitting self-serving evidence of a good habit (e.g., "my husband had a habit of driving within the speed limit") in one case but excluding self-inculpatory evidence of a bad habit (e.g., "I smoke a marijuana cigarette every morning and another every night") in another case. There is a reason for the application of precedent and stare decisis in the decision-making process.

> To avoid an arbitrary discretion in the Courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.

Alexander Hamilton, The Federalist, No. 78, at 471 (C. Rossiter ed. 1961).

> [S]tare decisis [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986).

> Despite my continuing reservations about the Argersinger [v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)] rule, it was approved by the Court in the 1972 opinion and four Justices have reaffirmed it today. It is important that this Court provide clear guidance to the hundreds of courts across the country that confront this problem daily. Accordingly, and mindful of stare decisis, I join the opinion of the Court. I do so, however, with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice.

Scott v. Illinois, 440 U.S. 367, 374-75, 99 S.Ct. 1158, 1162-63, 59 L.Ed.2d 383 (1979) (Powell, J., concurring, and supplying the fifth vote for the majority decision).

> I write separately only because I have previously joined or written four opinions dissenting from this Court's holdings that the defendant's predisposition is relevant to the entrapment defense. . . . Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore, I bow to stare decisis . . . .

Mathews v. United States, 485 U.S. 58, 66-67, 108 S.Ct. 883, 888-89, 99 L.Ed.2d 54 (1988) (Brennan, J., concurring, and supplying the fifth vote for the majority decision).

We, too, have recognized that "[p]art of our responsibility as the highest Court of this Commonwealth is to provide guidance for our trial judges as to how we expect them to conduct their trials." Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997). We pervert that responsibility when we hold simultaneously that habit evidence is reliable and admissible in one case but unreliable and inadmissible in another. While

I would prefer to admit the evidence of habit in both cases, if we are to reverse Burchett because of the introduction of such evidence, we must reverse this case for the same reason.

III.

Third, although the majority opinion recites that "Trooper Meadows' reliance on Mrs. Brown's testimony was reasonable," slip op., at 14, in fact, (1) Trooper Meadows did not rely on Mrs. Brown's testimony but on her out-of-court statements, and (2) no evidence was offered that habit evidence is reasonably relied upon by experts in the field of accident reconstruction in forming expert opinions as to the speeds of vehicles. KRS 703(a) provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. [Emphasis added.]

Prior to the adoption of KRE 703(a), the test for admission of an expert opinion premised upon inadmissible evidence was that the expert could "express an opinion based upon information supplied by third parties which is not in evidence, but upon which the expert customarily relies in the practice of his profession." Buckler v. Commonwealth, Ky., 541 S.W.2d 935, 940 (1976) (emphasis added). Thus, prior to the adoption of KRE 703(a), an expert was permitted to qualify his own opinion as reliable by merely testifying that he "customarily relied" upon the inadmissible evidence in formulating his own opinions. E.g., Foster v. Commonwealth, Ky., 827 S.W.2d 670, 678 (1992) (psychologist testified that the hearsay contents of a letter that he had reviewed was the type of information that he normally used in formulating his opinions).

Under KRE 703(a), there must be proof that the evidence underlying the expert's opinion is of a type reasonably relied upon by experts in general in that particular field of expertise. Gorman v. Hunt, Ky., 19 S.W.3d 662, 670 (2000).

Appellant's expert, Crawford, characterized the use of any "assigned speed" as an element in a momentum equation as a "dangerous practice." Trooper Anderson, who "did the math" in reliance on Mrs. Brown's habit evidence, made no attempt to address the reasonableness of his reliance on such evidence. The statement in the majority opinion that Trooper Meadows testified that "it is customary in the industry for accident reconstructionists to use personal testimony of approximate speed," slip op., at 15, is inaccurate. The only testimony on this issue occurred during the direct examination of Meadows by the prosecutor, viz:

> Q. In any other accident or collision, if you have people making statements of that nature, is it also a standard or practice that you would use their statements to determine speed? [Emphasis added.]
>
> A. Yes, sir. In the best case scenario, of course, you would have pre-impact skids to figure that speed, but here there was [sic] none, so we had to go with her . . . [interrupted].

The leading question posed to Meadows by the prosecutor and Meadows' interrupted response at best incorrectly incorporated the Buckler test of reliability, i.e., the witness's own "customary reliance," not the test now required by KRE 703(a), i.e., "reasonable reliance by experts in the field."

For these reasons, Appellant's motion in limine to suppress the opinions of the Commonwealth's experts as to the speed of Appellant's vehicle prior to the collision should have been sustained. Accordingly, I dissent and would reverse for a new trial.

Graves and Stumbo, JJ., join this dissenting opinion.