IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-1055-MR

DAVID CHRISTIAN — APPELLANT

V.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
2003-CR-0252

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, David Christian, was convicted in the Hopkins Circuit Court of murder and sentenced to life imprisonment. He appeals to this Court as a matter of right claiming that three errors warrant reversal of his conviction: (1) exclusion of testimony by defense expert, Dr. Mathias Stricherz; (2) the trial court's refusal to instruct the jury on voluntary intoxication; and (3) improper testimony by the Commonwealth's ballistics expert, Scott Boyle. Finding no error, we affirm Appellant's conviction and sentence.

Mid-morning on June 24, 2003, Jeff Webster and Michael Vincent, both employees of the Carhartt Distribution Plant, were returning from a break when they noticed a man laying face down next to a small lake located behind the plant. Concerned, Webster and Vincent approached the unconscious man and observed that he had blood on the side of his head. The men immediately drove back to the plant and directed the office receptionist to call 911. Vincent and a member of the

maintenance staff, Tom Hampton, returned to the lake. After confirming that the man was bleeding and unresponsive, Vincent returned to the plant to make sure that the authorities had been called.

While Hampton was waiting for EMS to arrive, Appellant drove up and asked Hampton if the man was hurt. When Hampton responded that he was, Appellant stated that he had been fishing with the man earlier that morning and identified him as James Williams.

At that point, EMS workers Paula Jones and Kevin Carlisle arrived and determined that Williams had a gunshot wound to the back of his head and was deceased. Appellant told Jones and Carlisle that he had been fishing with Williams earlier that morning but had not seen him since approximately 9:30 a.m. Carlisle noted, however, that there was no fishing equipment near Williams' body. Further, both Carlisle and Jones observed that Appellant acted "calm" and "normal" while talking to them.

Eventually, law enforcement personnel began to arrive. Hopkins County Sheriff's Deputies Elaine Yeager and Jeremy Crick interviewed bystanders, including Appellant. Appellant again claimed that he had ended his work shift around 7:00 a.m. and decided to go down to the lake to fish for awhile. Appellant stated that Williams drove up, walked down to the lake, and briefly spoke with him. Appellant said that he left the lake around 9:00 a.m., went to eat breakfast, and later returned to find Hampton standing with Williams' body. Yeager and Crick likewise noted that Appellant was "exceptionally calm" and did not appear intoxicated.

At some point, Appellant gave police permission to pat him down and search his vehicle. Williams' credit card was found in Appellant's pants pocket. Appellant initially

stated that he did not know how he got the credit card; then he claimed Williams gave it to him; and finally he said that Tom Hampton had handed it to him before the EMS personnel arrived. Williams' fishing gear was subsequently discovered in Appellant's car.

Appellant was thereafter taken to the police post where he gave a taped statement to Kentucky State Police Detective Ben Walcott. Appellant stated that he was fishing when Williams drove up, got out of his vehicle, and removed some fishing equipment. Appellant said that Williams then walked over to Appellant's vehicle and started looking around. When Appellant yelled at Williams, he responded angrily, and then picked up his equipment and walked down to the lake. Appellant then returned to his own vehicle. As he was loading his gear, Appellant claimed that Williams fired two shots at him. Appellant retrieved his gun from his car, walked to the side of the road, and fired one shot that apparently struck Williams. Appellant then took Williams' fishing tackle, wallet, and gun. He threw Williams' car keys in the lake and thereafter left the scene. On his way home, Appellant said he tossed Williams' wallet out on the side of the road and then went to the Madisonville Waste Management Station and dropped Williams' gun into the spillway. Appellant said he drove home and placed his own gun in a drawer in his bedroom. While at home, he claimed to have fired a hunting rifle to adjust the sight. After eating breakfast, Appellant returned to the lake where the shooting had occurred. Appellant specifically denied being under the influence of any alcohol or drugs.

Despite an extensive search, neither Williams' gun nor his wallet was ever located. Eventually, Appellant was indicted in the Hopkins Circuit Court for murder and first-degree robbery.

Appellant was tried in September 2004. The defense called numerous Carhartt employees who testified that Appellant was known to often use over-the-counter stimulants and caffeine to stay awake while working the third shift at the plant. However, none of the employees had observed Appellant consume any such products during the shift preceding the crime, nor did anyone testify that they observed anything unusual about Appellant's demeanor on the morning of the shooting.

Appellant took the stand in his own defense and testified that he frequently took ephedrine supplements to give him energy. He admitted that the supplements sometimes made him excited and jittery. Appellant stated that during his shift on June 23, 2003, he took "Ephedra Plus" and "Stackers" and that he also consumed coffee and Mountain Dew. He testified that despite consuming the substances, he was "wearing down" at the end of his shift.

Appellant's testimony as to what transpired at the lake differed from his statement to police. Appellant explained that he was fishing at the lake when Williams arrived, removed his fishing gear from his car, and then walked over to Appellant's car to look around. Although Appellant said that he yelled at Williams, he conceded that the two men never argued and that he was never in fear of Williams.

Appellant further testified that as he was loading his gear into his car, he heard what sounded like two gunshots. He retrieved his gun from his car and walked to the side of the road. Appellant claimed that he observed Williams with his arm outstretched holding what Appellant thought was a gun. Appellant then admitted to intentionally shooting Williams. Thereafter, Appellant claimed for the first time that when he walked over to Williams' body, he discovered that Williams did not, in fact, have a gun. Appellant further admitted that he took Williams' fishing gear and wallet.

Ultimately, Appellant confessed that he lied to police about Williams having a gun because he was scared and thought it would help him out. Appellant further stated that he was not excited or jittery at the time of the shooting, but rather was tired from the supplements having worn off.

At the close of the evidence, the jury found Appellant guilty of murder and acquitted him of first-degree robbery. Appellant was sentenced to life imprisonment. This appeal ensued. Additional facts are set forth as necessary.

I.

Appellant's first allegation of error concerns the trial court's refusal to allow the testimony of defense expert, Dr. Mathias Stricherz. The defense sought to offer Dr. Stricherz's opinion that Appellant was suffering from ephedrine intoxication at the time of the shooting.

On September 13, 2004, the trial court conducted an evidentiary hearing pursuant to KRE 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Dr. Stricherz testified that he is a psychologist, with a Doctorate of Education in counselor education, a Masters of Education in Guidance and Counseling, and a Bachelor of Arts in Behavioral Sciences. Dr. Stricherz was employed as a Drug and Alcohol Counselor and the Director of Student Counseling at the University of South Dakota.

Dr. Stricherz testified that he had training and education on the effects of over-the-counter ephedrine supplements, such as "Stackers" and "Ephedra Plus." Dr. Stricherz noted that he had done extensive reading on the subject of ephedrine and had counseled people that showed signs of ephedrine-induced "psychotic episodes." Dr. Stricherz reviewed a scientific study referred to as the "Rand Study," which

indicated that the over-the-counter supplements can cause physical and psychiatric problems. Dr. Stricherz testified that he reviewed Appellant's history of consuming these supplements and offered the following opinion:

> [I]t would seem to me, based on what [Appellant] told me, that a probable diagnosis, based on his use of "Stackers" the night before [the shooting] (sic). The number that he used, the amount of caffeinated beverages that he used, and all of the other substances that are likely in the "Stackers" product, he likely would have had ephedrine intoxication, as well as an ongoing diagnosis of ephedrine dependence, within that twelve month period.

On cross-examination, Dr. Stricherz conceded that his doctoral degree and expertise was in education, not medicine or toxicology. Further, he admitted that he had never published any articles on ephedrine nor had ever testified at a trial regarding the effects of such. Dr. Stricherz acknowledged that the so-called ephedrine "psychotic episodes" were generally the result of a combination of factors, and that the effects of ephedrine were, in large part, dependent upon not only the dosage amount, but also an individual's tolerance to the substance.

The Commonwealth thereafter called Dr. Mark Levon, a forensic pathologist, who testified that that the symptoms associated with ephedrine use would depend on the dosage; that ephedrine would not cause a person to be calm; and that the amount of ephedrine in over-the-counter products varies, with some having no level of the substance at all. Dr. Levon further stated that he was not aware of any scientific study that found ephedrine to be the sole cause of a psychotic episode.

The trial court initially ruled that Dr. Stricherz could not testify as to whether Appellant was intoxicated as a result of ingesting over-the-counter ephedrine substances at the time he shot Williams. The court subsequently clarified its ruling,

noting that Dr. Stricherz would not be precluded from testifying generally about the potential effects of the over-the-counter substances on the human body. Nevertheless, the trial court later reversed that ruling, concluding that science did not support an expert opinion regarding ephedrine intoxication, and further that Dr. Stricherz was not qualified to testify on the subject. His testimony was subsequently included in the record by avowal.

This Court has held that abuse of discretion is the proper standard of review of a trial court's ruling on the admissibility of expert testimony. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577-78 (Ky. 2000); Farmland Mutual Insurance Co. v. Johnson, 36 S.W.3d 368, 378 (Ky. 2000); see also General Electric Co. v. Joiner, 522 U.S. 136, 143, 118 S. Ct. 512, 518, 139 L. Ed. 2d 508 (1997). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. Goodyear, 11 S.W.3d at 581. In Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 489 (Ky. 2002), vacated on other grounds by Ford Motor Co. v. Smith, 538 U.S. 1028, 123 S. Ct. 2072, 155 L. Ed. 2d 1056 (2003), we noted the considerable breadth of discretion possessed by trial courts in performing their gate-keeping function under KRE 702, and emphasized that a reviewing court must "give great deference to the trial court's ruling and reverse only in circumstances of clear abuse."

In Stringer v. Commonwealth, 956 S.W.2d 883, 891 (Ky. 1997), we noted that expert opinion evidence is admissible so long as: (1) the witness is qualified to render an opinion on the subject matter; (2) the subject matter satisfies Daubert; (3) the subject matter is relevant; and (4) the expert's opinion will assist the trier of fact. Despite Appellant's exaltation of Dr. Stricherz's credentials, he clearly was not qualified

to render an opinion on the theory of ephedrine intoxication. As previously noted, Dr. Stricherz is a psychologist, not an expert in the fields of medicine, toxicology, or pharmacology. Consequently, he was not qualified to render an opinion on the effects of ephedrine on the human body. Thus, Appellant failed to satisfy the first prong of Stringer.

Notwithstanding Dr. Stricherz's qualifications, the subject matter of his testimony simply does not satisfy the standard set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., supra. This Court first adopted the Daubert analysis in Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995).[1] In Goodyear, supra, we followed Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), and held that the Daubert analysis applies to all expert testimony, not just scientific testimony. Thus, when faced with a proffer of expert testimony under KRE 702, the trial court's task is to determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to understand or determine a fact in issue. Daubert, 509 U.S. at 589-92, 113 S. Ct. at 2794-96; Goodyear, 11 S.W.3d at 578. This requires the trial court to assess whether the proffered testimony is both relevant and reliable. Id.

The consideration of relevance has been described as one of fit, while the consideration of reliability entails an "assessment into the validity of the reasoning and methodology upon which the expert testimony is based." Id. The central inquiry into

[1] Mitchell was overruled in Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999), but only as to the case-specific holding in Mitchell that the admissibility of DNA evidence in a criminal case should be determined on a case-by-case basis. Fugate held that the PCR and RFLP methods of DNA analysis are so well accepted that they are presumptively admissible under Daubert. Id. at 937.

the admissibility of expert testimony is therefore "an assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592-93, 113 S. Ct. at 2796; Goodyear, 11 S.W.3d at 581.

Both Daubert and Goodyear provide a non-exclusive list of factors to be considered by the trial court in determining the admissibility of an expert's proffered testimony:

> (1) whether the theory or technique can be and has been tested;
>
> (2) whether the theory or technique has been subjected to peer review and publication;
>
> (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and
>
> (4) whether the theory or technique has been generally accepted in the particular field.

Daubert, 509 U.S. at 593-94, 113 S. Ct. at 2796-97; Goodyear, 11 S.W.3d at 578-79. The Daubert analysis is a flexible one, and the trial court may apply any or all of the four Daubert factors when determining the admissibility of any expert testimony:

> In other words, a court may consider one or more or all of the factors mentioned in Daubert, or even other relevant factors, in determining the admissibility of expert testimony. The test of reliability is flexible and the Daubert factors neither necessarily nor exclusively apply to all experts in every case.

Johnson v. Commonwealth, 12 S.W.3d 258, 264 (Ky. 1999).

As the trial court concluded, Dr. Stricherz's opinion that Appellant was suffering from ephedrine intoxication at the time of the shooting was not supported by any reliable evidence. Dr. Stricherz's theory that ephedrine can cause "psychotic episodes"

was based upon his review of the "Rand Study," his counseling of fifteen to twenty people, and his bald opinion that Appellant was "likely" intoxicated. However, as noted by the Commonwealth's expert, the "Rand Study" only cited five instances out of some sixteen thousand where there were potential psychiatric effects from ephedrine. Moreover, Dr. Stricherz failed to cite to any other studies to support his opinion, and conceded that he had neither published any studies on ephedrine nor testified to its effects. In fact, Dr. Stricherz candidly admitted that he was not aware of any expert having testified about the isolated effects of such over-the-counter products. Thus, Dr. Stricherz failed to present any reliable scientific data to establish a link between ephedrine and intoxication or psychotic episodes.

The Commonwealth's expert, Dr. Levon, further pointed out that Dr. Stricherz's methodology was flawed because although Dr. Stricherz admitted that the effects of ephedrine depended largely on dosage, he failed to offer any evidence on the amount of ephedrine that would cause Appellant's intoxication or the level of Appellant's tolerance to the substance. Thus, while he opined that Appellant was "likely" intoxicated at the time of the shooting, he did not offer a reliable basis for that conclusion.

While KRE 702 has expanded the scope of expert testimony, "the courtroom is not the place for scientific guesswork . . . . Law lags science; it does not lead it." McClain v. Metabolife International, Inc., 401 F.3d 1233, 1247 (11th Cir. 2005) (quoting Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996)). Clearly, the defense failed to produce any scientifically valid evidence to support Dr. Stricherz's theory or to show that his theory has any acceptance in the scientific field. Daubert, supra. Indeed, even Dr. Stricherz noted that the study of ephedrine is a newly emerging area of

science. As such, the trial court did not err in ruling that Dr. Stricherz was not qualified to testify, and further that his proposed testimony was not supported by science.

II.

Appellant next argues that the trial court erred by refusing to instruct the jury on the defense of voluntary intoxication. Appellant claims that the evidence was unrefuted that he had been consuming large quantities of over-the-counter stimulants in conjunction with caffeine products, and was also suffering from sleep deprivation. He argues that his own testimony and that from lay witnesses justified an instruction on intoxication. We disagree.

KRS 501.010 provides, in relevant part:

> (2) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.
>
> . . . .
>
> (4) "Voluntary intoxication" means intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such duress as would afford a defense to a charge of crime.

However, pursuant to KRS 501.080, intoxication is a defense to a criminal charge only if such condition either: "(1) Negatives the existence of an element of the offense; or (2) Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

Appellant contends that his consumption of stimulants, in conjunction with his sleep deprivation and use of caffeine products, caused a "disturbance of mental or

physical capacities." KRS 501.010(2). And, further, that his ignorance of the potential harm caused by the substances showed that his intoxication was actually involuntary. Thus, Appellant submits that the jury could have reasonably concluded that the impact of the over-the-counter substances negated any intent, resulting in an acquittal of murder or a conviction for a lesser degree of homicide.

In Soto v. Commonwealth, 139 S.W.3d 827, 867 (Ky. 2004), cert. denied, ___ U.S. ___, 125 S. Ct. 1670, 161 L. Ed. 2d 495 (2005), this Court reaffirmed the long-standing principle that "[a]n instruction on voluntary intoxication is warranted only when there is 'evidence not only that the defendant was drunk, but that [he] was so drunk that [he] did not know what [he] was doing.'" (Quoting Springer v. Commonwealth, 998 S.W.2d 439, 451 (Ky. 1999)) (Emphasis added in Soto). See also Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003), cert. denied, 542 U.S. 922, 124 S. Ct. 2877, 159 L. Ed. 2d 781 (2004), and Foster v. Commonwealth, 827 S.W.2d 670 (Ky. 1991), cert. denied, 506 U.S. 921, 113 S. Ct. 337, 121 L. Ed. 2d 254 (1992). Appellant's own testimony belies any contention that he did not know what he was doing. He gave a detailed description of the events prior to and following the shooting. Further, he claimed that he intentionally fired at Williams after Williams allegedly shot at him. Every witness that observed Appellant either before or after the shooting testified that he was calm and lucid, and certainly showed no signs of intoxication. Indeed, Appellant's "defense was not that [he] could not form the requisite intent to murder [Williams] because of intoxication, but that [he] killed [Williams] intentionally in self-protection . . . ." Springer, 998 S.W.2d at 452.

The trial court is required to instruct the jury on every state of the case deducible or supported to any extent by the testimony and evidence. Taylor v. Commonwealth,

995 S.W.2d 355 (Ky. 1999). "[N]o matter how preposterous, any defense which is supported by the evidence must be submitted to the jury." Id. at 361. However, in this case, there was absolutely no evidence, even from Appellant himself, to support an instruction on voluntary intoxication. No error occurred.

III.

Finally, Appellant argues that the trial court erred in permitting the Commonwealth's firearms expert, Scott Doyle, to testify as to the shell casing pattern for the murder weapon. Appellant claims that Doyle's experiments were conducted in a controlled environment, not under circumstances similar to the shooting. Following a Daubert hearing, the trial court ruled that the evidence was scientifically reliable, and that the variables of the experiment went to the weight rather than the admissibility of the evidence. We agree.

Scott Doyle testified that he had been a firearms examiner for the Kentucky State Police for twenty-five years, and had conducted the experiment using Appellant's .9 mm pistol and ammunition similar to that found at the crime scene. Doyle explained that to measure the normal shell casing ejection pattern for the murder weapon, he fired the gun thirteen times from a fixed position, and thereafter marked the point of impact for each casing. Doyle then measured the distance and angle of departure for the casings. Doyle concluded that the normal ejection pattern for Appellant's weapon was five to seven feet, to the right at an angle of thirty-five degrees.

Doyle further testified that his tests were conducted in a laboratory setting, and that the purpose was solely to establish a base pattern from a fixed firing position. Doyle pointed out that he marked the point of impact for each casing, not where the casing came to rest. Further, Doyle conceded that a number of variables could

significantly alter the results, including the angle at which the shooter held the weapon, as well as the terrain where the shooting took place.

The Commonwealth acknowledges the decision in Stevens v. Commonwealth, 462 S.W.2d 182, 185-86 (Ky. 1970), wherein our predecessor court held:

> Generally speaking, the results of out-of-court experiments are admissible in evidence if such evidence tends to enlighten the jury and enable them to more intelligently consider the issues or if they provide evidence more satisfactory or reliable than oral testimony. Such evidence is never admissible, however, unless the conditions under which the experiment was performed were substantially similar to the case under consideration. The trial judge is vested with a broad discretion in determining both the question of substantial similarity of conditions and, if substantial similarity exits, the admissibility of the evidence.

(Citations omitted).

Clearly, Doyle's experiments were not conducted under substantially similar circumstances. Although he used the actual murder weapon and similar ammunition, the tests were conducted in a laboratory setting, not at the crime scene. Notwithstanding, Doyle's tests were never intended to be a re-creation of the crime. Rather, he sought to establish the standard shell casing ejection pattern for the weapon to refute Appellant's contention that he fired at Williams in self-defense from a distance of fifteen yards (45 feet). And further, Doyle was quick to point out to the jury that there were, in fact, numerous variables that could have affected the results.

In United States v. Metzger, 778 F.2d 1195, 1204 (6th Cir. 1985), the Sixth Circuit Court of Appeals opined:

> Experimental evidence may properly be admitted only if the test was conducted under conditions substantially

> similar to those of the event. However, the substantially similar standard is a flexible one which, even when construed strictly, does not require that all variables be controlled. E. Cleary, McCormick on Evidence, § 202, at 601-02 (1984); see also Randall v. Warnaco, Inc., 677 F.2d 1226, 1233-34 (8th Cir.1982) ("Admissibility . . . does not depend on perfect identity between actual and experimental conditions."). Indeed, most "[d]issimilarities between experimental and actual conditions affect the weight of the evidence, not its admissibility." Szeliga v. General Motors Corp., 728 F.2d 566, 567 (1st Cir.1984).

We likewise conclude that the dissimilarities between the experimental and actual conditions went to the weight of Doyle's testimony, not to its admissibility. The jury was made aware of the specifics of Doyle's tests and how they differed from the conditions at the time and place of the shooting. See Current v. Columbia Gas of Kentucky, 383 S.W.2d 139 (Ky. 1964). Doyle used the same .9 mm pistol that fired the fatal shot and used ammunition consistent with that recovered at the crime scene. The purpose of the tests was to determine, based on the shell casing pattern, the distance at which the gun was fired. Indeed, "[t]estimony on how . . . casings are ejected from a particular . . . weapon would allow the jury to draw conclusions about the proximity of the casings that they would otherwise be unable to make." Mondie v. Commonwealth, 158 S.W.3d 203, 212 (Ky. 2005). That the casing was found within ten feet of Williams' body, and the ejection distance of Appellant's gun was five to seven feet, certainly undermined Appellant's claim that he fired from a distance of forty-five feet.

Doyle was well qualified by his knowledge, training, and experience to conduct these tests and render an expert opinion as to the results. The trial court did not err in admitting this evidence.

The judgment and sentence of the Hopkins Circuit Court are affirmed.

All concur.

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