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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 21, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-20-07 ELA, Grow, D.C.

2006-SC-000300-MR

TONY GLASPER — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
NO. 05-CR-000473 & 05-CR-003112

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Tony Glasper, was convicted by a Jefferson County jury of sexual abuse in the first degree, assault in the fourth degree, and of being a persistent felony offender in the first degree. For these crimes, Appellant was sentenced to a total of twenty years in prison. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

On the evening of March 27, 2001, the victim in this case, S.C., became intoxicated while drinking an entire bottle of Amaretto at her home. Sometime between 11:00 p.m. and 1:00 a.m. that night, she decided to go to a local liquor store to purchase another bottle. At the liquor store, she obtained a cup of ice

and began drinking the Amaretto she just purchased. S.C. was very intoxicated that night and only remembers portions of what happened next.

After remaining at the liquor store for about thirty to forty minutes, S.C. met Appellant. The two soon left in Appellant's vehicle to obtain marijuana. After driving a short distance, Appellant stopped the vehicle and attacked S.C. Photographs taken at the hospital that night showed swelling and bruising near S.C.'s eyes, nose, and lips. There was also a laceration on S.C.'s right leg. S.C. remembers being choked by Appellant. S.C. told Appellant that she would do anything he wanted if he would permit her to live. Appellant ordered S.C. into the back seat and then sexually assaulted S.C. Fluid samples from S.C.'s arm and abdomen were eventually shown to contain Appellant's DNA.

After the attack, Appellant returned S.C. to the liquor store. Appellant asked S.C. if she still wanted some "weed." To placate him, S.C. agreed. Appellant told S.C. to give him her telephone number and she complied, writing down a fake name and number. Appellant then gave S.C. a piece of paper with the name "Tony" written on it and a telephone number. The telephone number was later determined to be that of Appellant's sister.

Once Appellant left, S.C. immediately drove to an unmanned police / EMS substation. Police eventually responded to her calls of distress and S.C. was transported to the hospital. At the hospital, S.C. was examined and a "rape kit" was collected. S.C. gave the slip of paper containing Appellant's name to police, as well as what she thought were the first three digits of Appellant's license plate (she was one digit off).

In March 2003, the police determined that the DNA found on S.C. matched that of Appellant. Appellant was subsequently tried and found guilty of the crimes set forth above in December 2005. A judgment was entered against Appellant on March 16, 2006. Thereafter, Appellant appealed his convictions directly to this Court as a matter of right. For the reasons set forth herein, we now affirm.

Appellant's sole argument on appeal is that the trial court abused its discretion when it overruled his motion for a mistrial. See Daniel v. Patrick, 333 S.W.2d 504, 506-07 (Ky. 1960) ("the trial court is possessed of wide discretion in respect to declaring a mistrial on account of surprise"). "A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005).

Appellant claims that urgent necessity existed in this case because he was caught off guard by a portion of S.C.'s testimony. Specifically, S.C. testified that at the time of the crime, she was dealing with numerous personal problems. These problems included being separated from her husband, being a full-time student, illnesses suffered by both her father and grandfather, and having just been diagnosed with bipolar disorder. S.C. claimed that she drank and smoked marijuana to cope with these issues.

Neither the Commonwealth nor Appellant was aware of S.C.'s bipolar disorder until her testimony at trial. Appellant moved for a mistrial, claiming that

he would have pursued a Barrosso hearing[1] had he been aware of such a diagnosis. However, the trial court pointed to medical records available to both the Commonwealth and Appellant which indicated that S.C. was briefly hospitalized for an episode of "acute psychosis" in 1994. The trial court determined that this information was more than sufficient to put Appellant on notice that a more thorough investigation into S.C.'s mental health history was warranted. The trial court then overruled Appellant's motion for mistrial.

Appellant first claims that an episode of "acute psychosis" over ten (10) years prior to trial was not sufficient to warrant a closer look at S.C.'s mental health history. We disagree.

"[I]nformation which affects the credibility of prosecution witnesses clearly falls within the category of exculpatory evidence." Rolli v. Commonwealth, 678 S.W.2d 800, 802 (Ky. App. 1984). In Barroso, supra, we stated that "[c]ertain forms of mental disorder have high probative value on the issue of credibility." 122 S.W.3d at 562. We further stated that "a conservative list of [mental] defects [that may materially affect the accuracy of testimony] would have to include *the psychoses*, most or all of the neuroses, defects in the structure of the nervous system, mental deficiency, *alcoholism*, drug addiction and psychopathic personality." Id. (Emphasis added).

In this case, there is an actual diagnosis of "acute psychosis" in S.C.'s medical file. Moreover, S.C.'s behavior on the night of the crime was indicative of possible alcoholism or other substance abuse. Appellant contends he had no

[1] In Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003), this Court held that defendants may compel an *in camera* review of a victim's mental health records if they can produce "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." Id. at 564.

obligation to investigate this very intriguing evidence because his investigator spoke with S.C.'s husband and the husband denied that S.C. had a mental illness. We find this argument to be completely without merit. The evidence speaks for itself and cursory denials from a witness do not absolve Appellant from pursuing and completing a diligent investigation as to all possible defenses.

Even in view of the husband's denial, Appellant nonetheless had more than enough evidence available to him to seek and obtain an *in camera* review of S.C.'s mental health records in accordance with the standards set forth in Barroso, supra. If Appellant had done these things, it appears likely that S.C.'s bipolar diagnosis would have been discovered prior to trial. See Richardson v. Commonwealth, 161 S.W.3d 327, 330 (Ky. 2005) (disclosure of relevant, but confidential mental health information was not permitted at trial because defendant failed to follow the proper pretrial procedures for obtaining and utilizing such information).

Appellant also makes the remarkable claim that he failed to learn of S.C.'s bipolar disorder due to negligence by the Commonwealth. Specifically, Appellant argues that since the Commonwealth was the only party with unfettered access to S.C., it was obligated, pursuant to disclosure requirements set forth in the pretrial order in this case and by a local rule, to make "a sufficient inquiry into S.C.'s mental health." If the Commonwealth had asked S.C. about her mental health, Appellant reasons, the Commonwealth would have learned about S.C.'s bipolar disorder and then been required to disclose it to Appellant pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecution has obligation to disclose exculpatory information in its possession).

We find Appellant's circular reasoning to be unpersuasive for several reasons. First, it is unclear whether a bare-bones diagnosis of bipolar disorder is exculpatory in the first place. See Barroso, 122 S.W.3d at 563 ("a mental illness that causes hallucinations or delusions is generally more probative of credibility than a condition causing only depression, irritability, impulsivity, or anxiety.") Second, Appellant had plenty of avenues to discover the information himself and thus, he may not rely on any perceived negligence by the Commonwealth to obtain relief. Finally, Appellant points to no authority whatsoever which would dictate that the Commonwealth must ask certain questions of its witnesses. Disclosure requirements set forth in the pretrial order and in a local rule are not applicable in this case because the bipolar diagnosis was never within the possession or knowledge of the Commonwealth prior to trial.

In Yates v. Commonwealth, 958 S.W.2d 306 (Ky. 1997), the Commonwealth failed to disclose relevant, but not exculpatory, information provided by its witness that was not contained in any written statements or reports. Id. at 308. We held that while the information caused surprise to the defendant at trial, there was simply no requirement on the part of the Commonwealth to disclose its knowledge of the witness' oral statements prior to trial. Id. In this case, not only was the Commonwealth not in possession of the information prior to trial, but also the Commonwealth was just as surprised as Appellant when the information was revealed at trial.

When the circumstances are reviewed in their totality, we find no abuse of discretion on the part of the trial court when it overruled Appellant's motion for mistrial. The Commonwealth has no affirmative obligation to ask its witnesses

certain questions for the benefit of Appellant. See Farris v. Commonwealth, 836 S.W.2d 451, 454 (Ky. App. 1992), overruled on other grounds by Houston v. Commonwealth, 975 S.W.2d 925 (Ky. 1998) ("Certainly, the Commonwealth is not required to investigate the case for the [A]ppellant[.]") In an adversarial system, both parties are tasked with representing their respective interests in a diligent and zealous manner. For whatever reason, Appellant failed to pursue and investigate leads suggesting that S.C. may have had mental health and/or substance abuse issues. Any subsequent surprise at trial regarding these issues was therefore the fault of Appellant and thus, we find insufficient grounds on which to base a finding of manifest injustice or necessity.

The judgment and sentence of the Jefferson Circuit Court is therefore affirmed.

All sitting. All concur.

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