

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-000490-MR

DATE 9-11-08 E.A. Grant D.C.

WILLIAM M. HENSON

APPELLANT

V. ON APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
NO. 04-CR-00224

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

As a result of a drunk-driving automobile wreck, Appellant, William M. Henson, was convicted of Second-Degree Manslaughter, three counts of Second-Degree Assault, Operating a Vehicle Under the Influence, Failure to Produce Insurance Card, and Persistent Felony Offender in the Second Degree (PFO II). Appellant assigns as error that witnesses were allowed to provide cumulative, inflammatory victim impact testimony during the guilt phase of trial and that the prosecution presented the surprise testimony of a key witness that should have been provided to the defense during discovery. We reject both claims of error and thus affirm.

On July 23, 2004, just before midnight, a blue Pontiac was rounding a curve on State Highway 12 in Shelby County when it crossed the center line and almost collided with a vehicle driven by Jimmy Baxter. Baxter veered his car over to the very edge of his lane to avoid colliding with the blue Pontiac. Baxter testified that he could see in his

rear view mirror that the blue Pontiac then began to head off the shoulder of that car's side of the road. Baxter next observed the blue Pontiac overcorrect and head into the path of a white car that had been traveling behind Baxter's car. As soon as Baxter got around the curve and did not see the white car behind him, Baxter turned around because he knew the two cars had collided.

Baxter was the first person on the crash scene. When he got there, he observed that the blue Pontiac had landed in a ditch close to the white Honda and had been smashed in on the passenger's side. When Baxter first approached the white Honda, he noticed that the driver's side door of the blue Pontiac was closed and there was no one on the outside of the car. Within a minute of walking to the white Honda, Baxter observed that the driver's side door of the blue Pontiac was open and a male, later identified as Appellant, was lying on the ground just outside the driver's side door. Baxter also observed a woman in the passenger seat of the blue Pontiac who looked to be crushed and pushed almost to the center of the car. Baxter stated that the woman was not moving and appeared to be dead.

Baxter testified that he saw a male, later identified as Matthew Burgin, trying to exit the driver's side of the white Honda, but that his legs were so badly crushed he could not get out. Next to Burgin, Baxter observed a female, later identified as Burgin's sister, Kelly Samples, screaming and lying face down on the dashboard with her head stuck through the center of the windshield. Baxter observed another female, later identified as Amy Mowery, in the front passenger side of the white Honda.

When EMS and law enforcement authorities arrived on the scene, it was confirmed that the woman in the passenger side of the blue Pontiac, later identified as Tammy Stephens, was dead. Deputy Riley Kennedy of the Shelbyville Sheriff's

Department, who was the first police officer on the scene, testified that when he arrived, Appellant was lying on the ground about two feet away from the driver's side of the blue Pontiac with his feet at the driver's side door. Kennedy observed that the front driver's side door was open, but the rear driver's side door was closed. When Kennedy checked on Appellant, Kennedy reported that he could smell the odor of alcohol about him. Kennedy stated that he could see numerous beer cans scattered around the blue Pontiac, some full and some empty. A cooler containing beer cans was also found in the blue Pontiac.

Burgin, Samples, Mowery, and Appellant all sustained extensive injuries in the crash. Burgin and Samples were transported via emergency air care to two different hospitals in Louisville. Appellant was transported to Jewish Hospital in Shelbyville where his blood and urine were tested for the presence of intoxicants. Appellant's blood alcohol was found to be 0.27 grams per 100 milliliters.

Jeff Ivers of the Shelby County EMS testified there had been a 50% intrusion into the passenger side of the blue Pontiac. According to Ivers, the rear of the blue Pontiac was buckled and pushed over such that any occupant in the back seat would have been trapped in the vehicle. Ivers described the position of Tammy Stephens' body as seated upright in the passenger seat of the blue Pontiac, trapped between the passenger door and the console. Ivers stated that her legs were trapped by the dashboard in the passenger side floorboard. Deputy Coroner Janet Morris testified that blood samples were drawn from Stephens and that her blood alcohol level was found to be 0.294 grams per 100 milliliters. From the examination of Stephens' body, the Coroner concluded that she died instantaneously from blunt force trauma as a result of the accident.

Detective Jason Rice, an accident reconstructionist for the Shelbyville Sheriff's Department, testified that he was called to the scene by Deputy Kennedy because it was a fatal accident. When Rice arrived on the scene, he was briefed by Kennedy and Deputy Daniel Wills on what was known about the accident up to that point. Rice was initially told that there were no witnesses to the accident.

As part of his job as accident reconstructionist, Rice testified that he is required to file a "fatal summary" of the accident, as well as an accident report. Rice stated that the "fatal summary" is to be filed within two to four hours after the accident, whereas the accident report is usually filed within three to five working days after the accident. In Rice's accident report, Rice stated that Appellant had been driving the blue Pontiac and further stated:

Mr. Henson was ejected from the vehicle thru [sic] driverside window. Mr. Henson suffered sever [sic] injuries from impact and the ejection path in which he took.

Dennis McWilliams, expert accident reconstructionist witness for the defense, testified that Appellant's and Stephens' injuries, which were predominantly on their right sides, were not consistent with Appellant being the driver of the vehicle. McWilliams explained that if Appellant had been driving, his injuries would have been the result of colliding with the left side of Stephens' body, yet Stephens did not sustain injuries to her left side. McWilliams testified that the only explanation for Appellant's injuries was that he was sitting in the back seat during the accident. McWilliams also rejected the notion that Appellant was ejected through the driver's side window because the window was not broken and was down only halfway in the photographs, which would not have been wide enough for Appellant's body to be ejected.

The Commonwealth presented the testimony of Michael Moore, Tammy Stephens' brother. He testified that he saw Appellant earlier that evening when he showed up at a friend's house at around 11 p.m., carrying a 12-pack of beer. Moore stated that Appellant drove himself to the house and was drinking at the time, although he was not "fully drunk." Moore left shortly after Appellant arrived and did not see who was driving when Appellant and Stephens left. According to Moore, although the blue Pontiac was initially purchased by Stephens, Stephens did not have a driver's license, so Appellant took over payments on the car and was the one who usually drove it.

A co-worker of Appellant's, Bobby Reynolds, testified that Appellant rode home with him from work in West Virginia the evening of the accident and that Appellant was drinking beer in his car on the way back. Reynolds stated that when they arrived back in Shelby County at around 9:30 p.m. that evening, Appellant got in his car and left.

Defense witness General Morgan testified that he saw Appellant and Stephens sometime between 11:00 p.m. and midnight on the night of the accident when he stopped at the B and N off of State Highway 12. Morgan stated that he saw Stephens in the driver's seat of the car and Appellant in the passenger seat drinking a beer. When they recognized each other, Appellant got out of the car to talk with Morgan. At some point during the conversation, Appellant got in the back seat of the car with his feet outside on the pavement, while Stephens was still in the driver's seat. After talking for a little while, Morgan got back in his car and left.

On August 5, 2004, Appellant was indicted on one (1) count of Murder, three (3) counts of First-Degree Assault, one (1) count of Second Offense Operating a Motor Vehicle Under the Influence of Intoxicants, one (1) count of Failure to Produce Insurance Card, and PFO II. After a jury trial held from May 22 – 24, 2006, Appellant

was found guilty of Second-Degree Manslaughter, three counts of Second-Degree Assault, Operating a Vehicle Under the Influence of Intoxicants, Failure to Produce Insurance Card, and PFO II. The jury recommended enhanced sentences of twenty (20) years for the Second-Degree Manslaughter and twenty (20) years on each of the three counts of Second-Degree Assault, to be served consecutively. The jury also recommended a six-month sentence and \$500 fine for the Operating a Vehicle Under the Influence of Intoxicants conviction, and a ninety-day sentence and \$1,000 fine for the Failure to Produce Insurance Card conviction. The trial court followed the jury's recommendations, except that all sentences were ordered to run concurrently for a total of twenty (20) years, and the fines were waived because Appellant had been declared indigent. This matter of right appeal by Appellant followed.

Appellant first argues that the trial court erred in allowing in cumulative and inflammatory victim impact evidence regarding the injuries sustained by Matthew Burgin, Kelly Samples, and Amy Mowery. At trial, Matthew Burgin, Kelly Samples and Amy Mowery all testified to the extensive injuries they suffered in the wreck. In addition, the Commonwealth asked the victims about their recovery and the long-term effects of their injuries.

When the Commonwealth asked Amy Mowery what she went through during her recovery from the injuries, Mowery responded that she experienced a lot of pain and depression, and lamented how she was forced to be dependent on other people. The prosecution then asked her about the lingering effects of the injuries and how it affected her today. Mowery stated that she is in pain every day and described the things that she no longer can do, adding that it was a horrible feeling to not be able to do the things she used to do. The Commonwealth asked Matthew Burgin what things he could no

longer do since the accident. Burgin testified how his recreational activities and mobility were limited by his leg injuries, that he cannot run now and that he experiences a lot of pain in his back, knees, hips, ankle and joints. The prosecution next asked if Burgin was the same person today that he was before the 2004 accident. Burgin responded that he was not the same person, and went on to describe how he sometimes “locks up” while driving at night when he sees another car coming down the street. Burgin testified that it took months before he could drive again and that not a day goes by when he does not think about the accident.

Appellant argues that the above testimony about the long term effects of the injuries was improper and irrelevant victim impact testimony. In viewing the trial, we see that the only objection made regarding the above questioning of Mowery and Burgin was to the Commonwealth’s question to Burgin about what things he could no longer do since the accident. Accordingly, this is the only issue preserved for appellate review. KRE 103(a)(1).

To prove First-Degree Assault, the Commonwealth is required to show that Appellant caused “a serious physical injury” to the victims. KRS 508.010(1). “‘Serious physical injury’ means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.” KRS 500.080(15). “‘Physical injury’ means substantial physical pain or any impairment of physical condition.” KRS 500.080(13). Determinations as to the relevance and admissibility of evidence are within the sound discretion of the trial court, and those decisions will not be overturned unless they are arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Johnson v. Commonwealth, 184 S.W.3d 544, 551 (Ky. 2005). In our

view, the testimony about the physical activities Burgin could no longer do was relevant to show the prolonged nature of the impairment to his health and bodily function as a result of the accident. Clearly, the evidence of the pain he still has in his back and lower extremities and his lack of mobility is relevant to show that he suffered a serious physical injury.

Over the objection of Appellant, the Commonwealth was also permitted to offer the testimony of Michelle Samples, the mother of Matthew Burgin and Kelly Samples. At the outset of Michelle Samples' testimony, Appellant objected to her testimony, claiming it was going to be cumulative of the testimony already given by Kelly Samples and Matthew Burgin and that it was clearly for the purpose of garnering sympathy for the victims. The Commonwealth argued that her testimony relative to Kelly Samples' injuries was not cumulative because Kelly could not remember much of what happened on the night of the accident due to her head injury. The trial court allowed Michelle Samples to continue testifying, qualifying its ruling by stating "but let's try to limit it somehow."

Michelle testified to the multiple injuries sustained by Matthew and about the various hospitalizations and surgeries he endured as a result of the accident. Responding to a question by the Commonwealth about how the wreck had changed Matthew, Michelle testified that he has emotional issues, he cannot play the sports he used to play, he cannot run or stand for any length of time, and he has scarring. She also testified that he was unable to finish college as a result of his injuries and surgeries. As to Kelly, Michelle likewise testified about the injuries she sustained, the progression of her recovery and her three hospitalizations as a result of the accident. At one point, Michelle got choked up talking about Kelly being in the critical care unit

because of her closed head injury and extensive facial fractures. When asked how the wreck had affected Kelly, Michelle testified that she has breathing and sinus problems, lots of facial scarring, and she had to have braces because of the damage to her teeth. Michelle also stated that the wreck had changed Kelly emotionally, and that she got teased at school because of her facial scars and had to sleep in her parent's room for some time after the accident.

Appellant contends that Michelle's testimony was either cumulative of testimony already given by Kelly Samples and Matthew Burgin regarding their injuries or was inflammatory and irrelevant victim impact evidence. KRE 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

"The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge."

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted); see also Sanborn v. Commonwealth, 754 S.W.2d 534, 543 (Ky. 1988), overruled on other grounds by Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006). Evidence is not to be introduced by the Commonwealth if it serves no legitimate evidentiary purpose other than to engender sympathy for the victim or his family. Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984).

Although Michelle's testimony regarding Kelly's and Matthew's physical injuries, treatment, and recovery was partially cumulative of their testimony, Michelle gave more detailed testimony about their injuries and the progression of their recovery. Kelly was only twelve years old when the accident occurred, and she suffered a closed head

injury, which resulted in her having little or no memory of the accident and her immediate treatment. As the mother of Kelly and Matthew, who was there to oversee their care and recovery, Michelle provided legitimate evidence regarding the seriousness of their physical injuries. See Commonwealth v. Hocker, 865 S.W.2d 323, 325 (Ky. 1993) (noting mother's testimony about son's injuries she observed, along with son's testimony was sufficient to prove "serious physical injury" element of First-Degree Assault).

As for the testimony regarding the emotional effects of the accident, while some of this testimony may have not have been relevant during the guilt phase, if there was any error, we deem it harmless given the isolated nature of the testimony and probative value of the bulk of her testimony. RCr 9.24. Contrary to Appellant's characterization of Michelle's testimony, it was not overly emotional and did not appear to be offered for the sole purpose of engendering sympathy for Kelly and Matthew. Although Michelle did choke up briefly during her testimony about Kelly's injuries, she quickly regained her composure and continued her testimony. Unlike other cases where reversal was warranted because of inflammatory victim impact testimony during the guilt phase, this was not a case where the witness gave lengthy testimony about the emotional loss suffered by the family as a result of the crime. See Ice, 667 S.W.2d at 675-76; Clark v. Commonwealth, 833 S.W.2d 793, 796-97 (Ky. 1991).

Given our ruling above, we reject Appellant's claim of prosecutorial misconduct in offering Michelle's testimony. We also note that Appellant did not raise the issue of prosecutorial misconduct in objecting to Michelle's testimony.

We now move on to Appellant's argument that he was denied a fair trial when the Commonwealth presented the surprise testimony of a key witness that should have

been provided to the defense during discovery. During the direct examination of Detective Jason Rice, the accident reconstructionist for the Commonwealth, Rice testified that, although he was initially told there were no witnesses to the accident, some time on the night of accident, he learned about Jimmy Baxter. Rice stated that he conducted a short interview of Baxter at the scene, and then a more lengthy second interview of Baxter some days after the accident, after he had already completed his accident report. Rice testified that he not learn about Baxter first seeing the driver's side door of the blue Pontiac closed and then seeing it open with Appellant lying outside the driver's side door until after the second interview of Baxter. Based on the information provided by Baxter in the second interview, Rice testified that, contrary to the theory in his police report that Appellant had been ejected through the driver's side window, he now believed that Appellant voluntarily exited the vehicle through the driver's side door after the accident.

Upon giving this testimony, defense counsel moved for a mistrial. Defense counsel stated that Rice was testifying to witness statements that were not provided to him during discovery. Defense counsel alleged that Rice was simply regurgitating Baxter's prior testimony to cover up for the fact that Baxter's testimony conflicted with Rice's theory in his police report that Appellant had been ejected from the vehicle. It was defense counsel's position that the Commonwealth was required to provide him with either Baxter's statement or a supplemental statement or report from Rice putting the defense on notice that Rice's opinion on how Appellant had exited the vehicle had changed. Defense counsel claimed that this surprise testimony undermined his whole defense. The trial court denied the motion for a mistrial, adding, however, that the defense was entitled to cross-examine Detective Rice on the fact that his opinion

changed about how Appellant exited the vehicle, and why he had never amended his report to reflect this change of opinion.

On cross-examination of Detective Rice, the defense questioned him extensively about his earlier opinion that Appellant had been ejected from the vehicle during the accident. The defense asked Rice to explain how Appellant could have been ejected from the vehicle if the driver's side window was intact. Rice testified that, from his recollection, the window was not intact and, in any event, it did not matter how Appellant exited the vehicle because it did not affect his opinion that Appellant was the driver of the vehicle. Rice testified that it was clear that Appellant had been driving the car because Stephens was pinned in the passenger side with her feet still in the floorboard and Appellant ended up on the outside of the car next to the driver's side door.

When asked why he changed his opinion after writing the accident report when he had already talked to Baxter, Rice explained that he conducted a second, more thorough interview of Baxter a week or two after the accident during which Baxter first told him about seeing the door of the blue Pontiac closed and then opened with Appellant on the outside of the driver's side. Rice testified that in investigating an accident, he usually calls witnesses to interview them again a week or two after the accident because they are often in shock immediately after the accident and will recollect things about the accident after some time has passed. When asked why he did not supplement his report to reflect the new information on how Appellant exited the vehicle, Rice responded that he did not think it was a significant fact because his opinion that Appellant was the driver of the vehicle, which was the crux of the case, did not change.

RCr 7.24(2) authorizes “pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant).” See Lowe v. Commonwealth, 712 S.W.2d 944, 945-46 (Ky. 1986). RCr 7.26(1) provides in pertinent part:

[T]he attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

Pursuant to the pre-trial discovery order in this case, the Commonwealth provided Appellant with Rice’s accident report. The Commonwealth had no written or recorded statement from Baxter. However, the Commonwealth furnished the defense with its witness list, which included Jimmy Baxter, as well as Baxter’s phone number.

Apparently, the defense never contacted Baxter prior to trial.

In Yates v. Commonwealth, 958 S.W.2d 306 (Ky. 1997), a police officer failed to mention in his written report that he had seen the defendant near the place where the murder weapon was discovered, and failed to file an amended report containing this fact. Yates claimed the Commonwealth engaged in misconduct when it only made the written statement available to the defense and failed to inform the defense of the omitted portion of his statement. Id. at 307. This Court held that the Commonwealth had no duty to advise Yates of the additional information from the police officer not contained in his written report:

Despite the fervor with which Appellant presses this issue, he is unable to cite, and we are unable to find, any rule or precedent which would require the Commonwealth to take such action. RCr 7.26(1) is clear in requiring only written statements to be made available for use by the defendant. It is not an infrequent occurrence during a criminal trial that a witness who has produced or signed a written statement reveals details not contained in the document. There is no authority that would require a trial judge to confine a witness's testimony to the four corners of his or her written statement. Trial lawyers scrutinize the motive or basis for such omissions or additions through the art of cross-examination.

Id. at 308. The Court further noted that the omitted information was not exculpatory, and there was no evidence that the Commonwealth withheld the information as part of a conspiracy to obtain a conviction. Id.

In the case at bar, the Commonwealth was not required under RCr 7.24(2) to disclose Baxter's verbal statements to Rice, and given that Rice did not amend his report, there was no supplemental police report available for discovery. As in Yates, there was no indication that the Commonwealth was intentionally withholding evidence to ambush the defense at trial. The Commonwealth included Jimmy Baxter on its witness list and the defense was free to interview him before trial. Also, as in Yates, the substance of the testimony at issue (that Appellant voluntarily exited the vehicle from the driver's side of the car after the accident) was certainly not exculpatory.

Appellant argues that the Commonwealth had a duty to disclose the evidence at issue because it was a significant piece of evidence that he was denied the right to form a defense against prior to trial, citing Barnett v. Commonwealth, 763 S.W.2d 119 (Ky. 1988) (defendant entitled to pre-trial knowledge of expert serologist's theory that defendant had trace amounts of blood on his hands and arms attributable to washing away blood from victim's wounds). However, unlike Barnett, the information that was

not disclosed was not the basis of Rice's ultimate conclusion that Appellant was driving the car. See also Milburn v. Commonwealth, 788 S.W.2d 253, 256 (Ky. 1989) (no discovery violation found where expert opinion was not based on additional undisclosed premise that defendant was entitled to defend against). Rice testified that he based his opinion that Appellant was driving the car on the position of Stephens' body after the accident, not on how Appellant exited the vehicle. From the discovery information, Appellant was well aware of the position of Stephens' body and the fact that the Commonwealth believed she was the passenger in the vehicle and Appellant was the driver.

The case at hand is likewise distinguishable from Akers v. Commonwealth, 172 S.W.3d 414 (Ky. 2005), wherein an additional police report regarding the crime was withheld from the defense and deemed reversible error. In the instant case, there was no police report withheld from the defense. Thus, there was no discovery violation.

We also note that Appellant never specified how this "surprise evidence" that he voluntarily exited the car undermined his whole defense. Appellant was still able to cross-examine Rice on his initial ejection theory and on why he failed to later amend his report. Further, Appellant was still able to present his own accident reconstructionist expert to refute the Commonwealth's claim that Appellant was driving.

"In matters dealing with discovery it is within the discretion of the trial court to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances." Berry v. Commonwealth, 782 S.W.2d 625, 627-28 (Ky. 1990), overruled on other grounds by Chestnut v. Commonwealth, 250 S.W.3d 288 (Ky. 2008). The trial court in

this case did not abuse its discretion in denying the motion for mistrial and in allowing Detective Rice to testify to how his opinion of how Appellant exited the car had changed after his subsequent interview with Baxter.

For the reasons stated above, the judgment of the Shelby Circuit Court is affirmed.

All sitting. All concur, except Venters, J., not sitting.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEES:

Jack Conway
Attorney General

Susan Roncarti Lenz
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601