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NOT TO BE PUBLISHED OPINION

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RENDERED: NOVEMBER 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000483-MR

RANDALL JAMES HICKEY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
NO. 09-CR-01050

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Randall James Hickey appeals as a matter of right from a conviction of arson in the first degree. Concluding no reversible error occurred, we affirm.

Appellant was an employee of Meijer, a large retail and grocery store. He and his wife were expecting their first child together. This was a difficult pregnancy and Appellant had to request off work in order to take his expectant wife to the hospital on a number of occasions. Appellant indicated that he was written up for these absences, despite having a doctor's note, and that he did not believe his employer was understanding. After a couple of months of working at Meijer, Appellant began to steal from the store, including items such as baby clothes, laptop computers, shoes, mp3 players, and DVDs. The loss prevention team at Meijer decided to install a camera in the media storage

room with the hope of catching the person stealing merchandise. The camera captured Appellant entering the media room on April 1, 2009, and leaving the room upon noticing the newly installed camera.

Through Appellant's testimony and prior interviews, it was established that thereafter he took a lighter and lit a piece of paper from a trashcan on fire, leaving it in the area of the store where pool chemicals were located. By the time that members of the Meijer loss prevention team noticed the fire, it was approximately eight feet wide and close to the top of the store's thirty-foot ceilings. Two members of loss prevention unsuccessfully attempted to extinguish the fire before evacuating the building.

The burning pool chemicals caused chemical reactions producing poisonous chlorine gas, and the water used by the fire department to extinguish the fire caused several small explosions and created hydrochloric acid. The total damage as a result of building and product loss was estimated at $382,000.00 and included damage to the products, walls, shelving units, ceiling, and floors of the immediate area, as well as items throughout the store that were damaged by their exposure to the chlorine gas.

Appellant was terminated from Meijer for stealing. Appellant was also suspected of having set the fire. In his first interview, conducted by fire investigator Captain Gary Ward, he denied having set the fire. In a subsequent interview, conducted by a police detective and observed by Captain Ward, he confessed that he had set the fire, and that he did so because he was angry at Meijer for giving him a hard time when he needed time off to take his pregnant

wife to medical appointments. Appellant testified on his own behalf at trial. Differing slightly from the confession, Appellant testified that he set the fire attempting to create a distraction so that he could get a bag of items he wanted to steal out of the store. He admitted to knowing that people were inside the building at the time he set the fire, but that he had not intended for the fire to progress into what it did, and had not intended to hurt anyone. Following the trial, the jury rendered a verdict of guilty of arson in the first degree. The trial court sentenced Appellant to twenty years per the jury recommendation. He appeals to this Court as a matter of right.

On appeal, Appellant first argues that the trial court erred in permitting Captain Ward to testify regarding his training on recognizing signs of deception when conducting an interview. Because Captain Ward did not give any opinion as to whether Appellant or any other witness had been deceptive, any error in the admission of this testimony was harmless. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009).

Appellant next argues that the trial court erred in not *sua sponte* holding a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on the reliability of these specific signs of deception testified to by Captain Ward. Again, because Captain Ward was not asked and did not offer any opinion as to whether the Appellant or any other witness had been deceptive, any error was harmless. *Winstead*, 283 S.W.3d at 688-89.

Appellant next argues that the prosecutor, during her closing argument, made an improper comment undermining the veracity of the testimony of the

Appellant's spouse, contravening this Court's holding in *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997). When listing the specific body language that he was trained would indicate deception, Captain Ward mentioned that a woman will cross her arms. During her closing remarks, the prosecutor reminded the jury of Captain Ward's testimony of the "signs of deception," one of which was that women will cross their arms across their chest. She then asked the jury to think about the fact that Appellant's spouse had crossed her arms during her testimony, implying that Appellant's spouse was lying. Appellant concedes this error is unpreserved, and requests palpable error review per RCr 10.26.

Despite the wide latitude afforded to a prosecutor in closing arguments, *Commonwealth v. Mitchell,* 165 S.W.3d 129, 132 (Ky. 2005), the prosecutor's attempt to use the testimony about the "signs of deception" as proof that the Appellant's spouse was lying would have required a *Daubert* hearing to first ensure the scientific reliability of this technique. Nevertheless, a party claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law. *Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky. 2006). Appellant's spouse's testimony largely concerned the history of her relationship with Appellant and his demeanor the night of the fire, which did not go to establishing any element of the crime. Moreover, the prosecutor's comments were isolated and the evidence against the defendant was very strong (he admitted to starting the fire). In light of the above, we see no palpable error.

Finally, Appellant argues that the trial court erred in admitting a misleading videotaped experiment into evidence. Three days prior to trial, the Commonwealth informed the trial court and Appellant that it intended to introduce a videotape of a controlled burn performed at the fire department of a single box of pool chemicals like the boxes that were burned at Meijer. Appellant's counsel objected, arguing that the videotape evidence would be prejudicial and unlike the conditions present when Appellant set the fire at Meijer. The prosecutor countered that only one box of pool chemicals would be burned in order to demonstrate the "mini explosions" that resulted from the chemical reactions of the pool chemicals when they reached a given temperature. The trial court reserved judgment until it had a chance to review the video, but ultimately ruled that the video tape would be admissible.

As with other types of evidence, the admissibility of experiment evidence is discretionary and the trial court's ruling will be disturbed on appeal only if that discretion is abused. *Cecil v. Commonwealth*, 297 S.W.3d 12, 20 (Ky. 2009) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007).

"No specific provision on evidence generated by demonstrations and experiments is contained in the Kentucky Rules. In the absence of such a provision, admissibility issues will have to be viewed as matters of relevancy, and resolved by application of Rule 401, 402, and 403." Robert C. Lawson, *The*

Kentucky Evidence Law Handbook, § 11.15(3) (4th ed. 2003). Relevant evidence is generally admissible unless its probative value is substantially outweighed by its unduly prejudicial effect. KRE 402; 403.

Federal courts, applying rules much like ours, have held that experiment evidence is generally admissible if it bears upon a material issue and if the proponent establishes a sufficient similarity between the conditions of the experiment and those of the event in question. *Rankin v. Commonwealth*, 327 S.W.3d 492, 498 (Ky. 2010) (citing *United States v. Williams*, 461 F.3d 441 (4th Cir. 2006); *United States v. Baldwin*, 418 F.3d 575 (6th Cir. 2005); *United States v. Gaskell*, 985 F.2d 1056 (11th Cir. 1993); *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992)).

Demonstrations and experiments are not only offered to reproduce or duplicate events involved in litigation - they may also be offered as general proof of a physical or scientific principle or phenomenon, and the rules that govern admissibility depend to some extent on the purpose for which the evidence is offered. Lawson, § 11.15(1).

The "substantially similar" test is presently viewed in federal courts as a prerequisite to admissibility only when the evidence is offered to replicate the event or accident involved in the litigation, however, it is not crucial to admission of the evidence if the demonstration or experiment is offered for the purpose of merely demonstrating a scientific principle, empirical finding, or similar phenomenon. *Champeau v. Fruehauf Corp.*, 814 F.2d 1271 (8th Cir. 1987).

Likewise, this Court has explained that what counts as "sufficient" similarity depends on the purpose for which the evidence is being offered, and if the experiment is not meant to simulate what happened, but rather to demonstrate some general principle bearing on what could or what was likely to have happened, then the differences between the experiment and the event at issue go to the weight of the evidence, rather than to its admissibility. *Rankin*, 327 S.W.3d at 498-99.

In the present case, the Commonwealth explained that the purpose of the controlled burn was to demonstrate how quickly such chemicals burn and, in particular, the "popping" and "mini-explosions" that resulted when the particular chemicals were heated.

Here, as in *Rankin,* because the controlled burn was not offered to the jury as an image of what happened, it posed little risk of undue prejudice. 327 S.W.3d at 499. This is evident in the design and scope of the controlled burn. Its purpose was to show the chemical reaction of the pool chemicals when they reach a particular temperature. Because demonstrating this principle did not require the Commonwealth to recreate a fire using twelve boxes of pool chemicals, it was conducted on a much smaller scale. The differences between the controlled burn of one box of pool chemicals and the original fire at issue which fed off twelve boxes of pool chemicals are appropriately considered in terms of the weight of the controlled burn as evidence, rather than to its admissibility in the trial. Thus, the trial court did not abuse its discretion in admitting the videotape of the controlled burn of pool chemicals into evidence.

For the forgoing reasons, the judgment of the Fayette Circuit Court is hereby affirmed.

All sitting. All concur.

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