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RENDERED: DECEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000626-MR

HOPE RENEE WHITE — APPELLANT

V.

ON APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
NO. 09-CR-00079

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A Wayne Circuit Court jury found Appellant, Hope Renee White, guilty of murder, for which she received a thirty-year prison sentence. She now appeals as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erred to her substantial prejudice by denying her tendered instructions, by inhibiting her from questioning a witness with respect to specific instances of untruthfulness on the part of a prosecution witness, and by denying her request to introduce evidence that she passed a state-police-issued polygraph examination when questioned about the victim's death.

I. BACKGROUND

On August 18, 2009, Appellant was indicted for murdering Julie Burchett. The charges arose from an incident that occurred on July 18, 2008, in which Appellant stabbed Burchett for having an affair with her boyfriend,

Bobby Buster. At trial, the jury found Appellant guilty of murder and recommended a thirty-year prison sentence. This appeal followed.

Because we agree with Appellant that the trial court erred to her substantial prejudice when it denied her request for an instruction on first-degree manslaughter, we reverse Appellant's conviction for murder and remand for a new trial. However, we address all of Appellant's arguments, as these issues will likely recur on retrial.

II. ANALYSIS

A. Instructions

Appellant first argues that the trial court erred when it denied her request for instructions on several lesser included offenses and voluntary intoxication. In *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010), we succinctly explained the trial court's duty with respect to lesser included offenses and affirmative defenses:

> [A] trial court is required to instruct the jury on affirmative defenses and lesser-included offenses if the evidence would permit a juror reasonably to conclude that the defense exists or that the defendant was not guilty of the charged offense but was guilty of the lesser one. *Fredline v. Commonwealth*, 241 S.W.3d 793 (Ky. 2007); *Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007). It is equally well established that such an instruction is to be rejected if the evidence does not warrant it. *Payne v. Commonwealth*, 656 S.W.2d 719 (Ky. 1983).

In that decision, we further noted that a trial court's decision not to give an instruction is reviewed for an abuse of discretion. *Id.* (*citing Crain v. Commonwealth*, 257 S.W.3d 924 (Ky. 2008)).

In this case, the Commonwealth called several witnesses who gave varying accounts of people, places, times, and events. For instance, Jason Miller testified that he, Appellant, Burchett, Buster, and Seth Frost were "getting high" at the lake. According to Miller, these individuals, along with Darrell White, Johnny White, Adam Manning, and Scotty Stanton, later attended a party at Appellant's mother's house, and all were drinking alcohol and "getting high." At the party, Miller heard Appellant and Buster arguing about Buster having an affair with Burchett. Miller then saw Appellant approach Burchett and say, "Julie, tell me it ain't true. Tell me that you haven't been sleeping with [Buster]." Miller further testified that Burchett then started crying and went to the bathroom; when Burchett returned, Appellant walked toward her with a knife and stabbed her once in the chest.

Manning testified that he and others were drinking alcohol at the party, but he saw no drugs. He further testified that he saw Appellant cussing and screaming at a woman over "some boy." According to Manning, the two women began grappling and then Appellant pulled an object from under her skirt and stabbed the other woman.

Stanton testified that he walked into the party with Manning and saw Appellant and another woman arguing, and then fighting and pulling each other's hair for approximately 15 seconds. According to Stanton, he never saw a knife or any blood and the two women were still fighting when he left. Appellant, Buster, Darrell White, and Johnny White were subsequently called by defense counsel and all denied attending the party.

belief that a defendant was so voluntarily intoxicated that he did not form the requisite intent to commit murder does not require an acquittal, but could reduce the offense from intentional homicide to . . . second-degree manslaughter." *Id.* at 857 (citations omitted).

Following *Slaven*, in *Thomas v. Commonwealth*, 170 S.W.3d 343, 346 (Ky. 2005), this Court reversed the appellant's convictions for intentional assault in the first degree and of wanton assault in the second degree and remanded for a new trial because the trial court failed to instruct the jury on assault under extreme emotional disturbance. In so doing, the Court pointed out that KRS 507.020(1)(a) provides that, in any prosecution for assault in the first, second, or third degree, "in which intentionally causing physical injury or serious physical injury is an element of the offense, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance . . . ." *Id.* at 347.

KRS 507.020(1)(a) provides that "a person shall not be guilty [of murder] if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." However, extreme emotional disturbance does not constitute a defense to first-degree manslaughter. *Id.*; *see also* KRS 507.030 (stating that a person is guilty of first-degree manslaughter if he or she intentionally causes the death of another person while acting "under the influence of extreme emotional disturbance").

"Thus, if [a] jury finds that [a defendant] committed the intentional act of murder, but finds the existence of extreme emotional disturbance, then the crime must be reduced to manslaughter in the first degree." *Holbrook v. Commonwealth*, 813 S.W.2d 811, 815 (Ky. 1991), *overruled on other grounds by Elliott v. Commonwealth*, 976 S.W.2d 416 (Ky. 1998).

Based upon KRS 507.020(1)(a) and our decisions in *Slaven* and *Thomas*, we consider the trial court's refusal to instruct on first-degree manslaughter as a lesser included offense of murder to be prejudicial error. As in *Slaven*, we refuse to countenance an instruction for extreme emotional disturbance without a contemporaneous instruction for first-degree manslaughter.[2] Simply put, "[i]f there is an issue whether the defendant was acting under the

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[2] If Appellant had not been entitled to the murder instruction which obligated the Commonwealth to disprove extreme emotional disturbance, we would have deemed the trial court's refusal to instruct on first-degree manslaughter to be harmless error. However, we believe the varying accounts set forth by the Commonwealth warranted an instruction for extreme emotional disturbance. *See Benjamin v. Commonwealth*, 266 S.W.3d 775, 783 (2008) ("This series of events, *while not necessarily establishing that extreme emotional disturbance existed,* is wholly sufficient to warrant an instruction for EED for the jury's benefit.").

Specifically, we note that Miller testified that Appellant and Buster were arguing about Buster having an affair with Burchett and that Appellant then confronted Burchett about the affair before stabbing her. Moreover, Manning testified that he saw Appellant cussing and screaming at a woman over "some boy" before they began grappling while Stanton saw Appellant and another woman arguing and then fighting. Such a narrative, albeit jumbled, is analogous the facts underlying our decision *Benjamin*, wherein we determined that the trial court committed reversible error by failing to instruct the jury on extreme emotional distress. 266 S.W.3d at 783. In that case, evidence was introduced that the appellant was enraged because his wife had been involved in an affair:

> The night before the homicide, Marcus Benjamin was confronted with allegations of infidelity as well as the news that his wife had been engaging in an extramarital affair with a family member. The following morning, the victim returned and the argument between the two resumed, this time including assertions that Benjamin would never see his children again. Further, Benjamin claims that he was physically

influence of extreme emotional disturbance, this instruction must be accompanied by an instruction on First-Degree Manslaughter as a lesser included offense . . . ." 1 Cooper, Kentucky Instructions to Juries (Criminal) § 3.21 (5th ed. 2011); *see also Springer v. Commonwealth*, 998 S.W.2d 439, 452-453 (Ky. 1999) (concluding that, if the evidence is the same on retrial, the appellant would be entitled to instructions on first-degree manslaughter as a lesser included offense of murder and a concomitant instruction on extreme emotional disturbance).

Because the trial court abused its discretion in denying Appellant's requested instruction, we reverse Appellant's conviction for murder and remand for a new trial. Since Appellant's other allegations of error are likely to recur on remand, we also address them.

2. Voluntary Intoxication

Under KRS 501.080(1), voluntary intoxication is a defense to a criminal charge only if the intoxication "[n]egatives the existence of an element of the offense." We have consistently recognized that a defendant must set forth sufficient evidence to justify such an instruction:

> [E]vidence of intoxication will support a criminal defense only if the evidence is sufficient to support a doubt that the defendant knew what she was doing when the offense was committed. In order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing. *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112, 117–18 (1990); *Meadows v. Commonwealth*,

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attacked by the victim during this final argument, at which point the altercation turned deadly.

Id. at 783.

Ky., 550 S.W.2d 511 (1977); *Jewell v. Commonwealth*, Ky., 549 S.W.2d 807 (1977), *overruled on other grounds*, *Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981).

Springer, 998 S.W.2d at 451.

As noted, Miller testified that Appellant was "getting high" at the lake and the party. Manning testified that persons were drinking alcohol at the party, although he never confirmed that this included Appellant.

The testimony of Miller and Manning only tangentially establishes that Appellant was intoxicated at the incident, as none of these witnesses specifically described Appellant as being intoxicated. However, even if we assumed Appellant was intoxicated, we do not believe their testimony set forth evidence sufficient to support a doubt that she knew what she was doing when the offense was committed. In fact, Miller heard Appellant accost Burchett immediately prior to the stabbing, stating "Julie, tell me it ain't true. Tell me you haven't been sleeping with Bobby."

Because the testimony of Miller and Manning did not establish sufficient evidence, the trial court did not abuse its discretion in denying an instruction on voluntary intoxication, as well as second-degree manslaughter and reckless homicide.

B. Inhibited Questioning

Appellant next alleges that the trial court erred when it prohibited her defense counsel from questioning Corbin Police Officer Tim Baker with respect to specific instances of untruthfulness on the part of Manning, who was a prosecution witness. At trial, Manning testified that he saw Appellant and

another woman grappling, and then saw Appellant pull an object from under her skirt and stab the other woman. Appellant subsequently called Officer Baker, who testified that he was well-acquainted with Manning through his work as a police officer and considered him to be a liar. On cross-examination, Baker confirmed that Manning would have a fairly good knowledge of what a methamphetamine lab looked like and that he was known for being a "partier." In response to the prosecutor's question as to whether Baker had ever questioned Manning with respect to someone else's conduct, Baker testified that he had only questioned Manning about something he had caught Manning doing.

On redirect, defense counsel attempted to ask Baker about what Manning would do whenever he encountered Manning in his line of work. The trial court, though, sustained the prosecutor's objection to counsel's attempted use of specific instances of conduct, but allowed counsel to ask additional questions by avowal. During his avowal testimony, Baker stated that he had encountered Manning quite a few times and arrested him two to three times. The first time Baker stopped Manning's car, Baker observed him stuff syringes over his visor, yet Manning claimed to know nothing about the syringes until Baker removed them. In those situations, Baker asserted that Manning cried and lied, and that he had lied in every interaction he had with Baker. According to Baker, drug officers had used Manning to provide information on other people in the past, but were no longer willing to do so because he had lied to them so many times.

Appellant contends that the trial court erred because Baker's testimony complied with KRE 608(a) and violated her right to present a defense.[3] We address each separately.

1. KRE 608(a)

KRE 608(a) states that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," with the limitation that "the evidence may refer only to character for truthfulness or untruthfulness . . . ." According to Appellant, Baker's testimony complied with this rule because it was evidence in the form of reputation. Appellant complains that, due to the trial court's ruling, the jury heard Baker say he thought Manning was a liar, yet did not hear him comment on Manning's broader reputation for untruthfulness within the Corbin law enforcement community.

Appellant's argument, though, ignores that her defense counsel asked Baker what Manning would do whenever he encountered Manning in his line of work—not to describe Manning's broader reputation for untruthfulness. Moreover, Baker specifically testified on avowal that drug officers were no longer willing to use Manning as an informant because he had lied to them so

[3] Appellant failed to argue that the court's ruling impaired her right to present a defense in her initial brief, instead raising the issue in her reply brief and thereby inhibiting the Commonwealth's ability to respond. However, we address her argument despite this omission, as it may recur on retrial.

many times rather than generally describe Manning's reputation for lying within the Corbin law enforcement community.[4]

If Appellant's counsel had framed the question differently, e.g., by inquiring as to Manning's reputation within the community instead of specific instances of conduct, we might agree that Baker's testimony complied with KRE 608(a). However, in light of defense counsel's inquiry, as well as Baker's testimony on avowal, we cannot say that the trial court erred in prohibiting further questioning.

2. Right to Present a Defense

We follow the United States Supreme Court's unequivocal pronouncement that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotations omitted); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). However, "state and federal rulemakers have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials" because a "defendant's right to present relevant evidence is not unlimited." *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998) (emphasis added). This latitude is impermissibly exceeded when an accused's right to present a defense "is abridged by evidence rules that infring[e] upon a

[4] We note that "[m]odern conditions have created a need for a different concept of 'reputation,' one that looks for what is said about a person by and among people with whom he or she associates in the ordinary walks of life." R. Lawson, Kentucky Evidence Law Handbook, § 4.20[4] (4th ed. 2003) (footnote omitted).

weighty interest of the accused and are *arbitrary or disproportionate* to the purposes they are designed to serve." *Holmes*, 547 U.S. at 324 (internal quotation marks omitted) (emphasis added).

As discussed, Appellant disputed the trial court's decision to prohibit her from further questioning Officer Baker. However, she fails to argue that our evidentiary rules are either "arbitrary or disproportionate to the purposes they are designed to serve." And, as we noted in *Mills v. Commonwealth*, 996 S.W.2d 473, 489 (Ky. 1999), "*Chambers* . . . does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense." As a result, we cannot say that the trial court's ruling violated Appellant's right to present a defense.[5]

C. Polygraph Exam

Appellant contends that the trial court erred when it denied her request to introduce evidence that she passed a state police-issued polygraph examination when questioned about Burchett's death. However, this Court "has held repeatedly and consistently that it does not yet consider such evidence scientific or reliable." *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky. 1984) (footnote omitted). In fact, in *Morton v. Commonwealth*, 817 S.W.2d 218, 221-222 (Ky. 1991), this Court declared that "under no circumstances should polygraph results be admitted into evidence" and thus rejected the appellant's

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[5] *See Fresh v. Commonwealth*, 2009-SC-000797-MR, 2011 WL 1642275 (Ky. April 21, 2011); *Gatewood v. Commonwealth*, 2009-SC-000644-MR, 2011 WL 2112566 (Ky. May 19, 2011).

complaint that the trial court erred by refusing to admit the result of his polygraph examination.

Appellant, though, asks us to reexamine our precedent, as she argues that the exclusion of her examination results impaired her right to present a defense. In support, Appellant points to our decision in *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002).[6]

In *Rogers*, this Court found that the trial court committed reversible error when it prohibited the appellant from introducing evidence that he confessed to committing a murder only after a law enforcement officer informed him that he had failed a polygraph examination. 86 S.W.3d at 37-38. In so doing, the Court held that, in certain cases, "the defendant's right to present a defense trumps our desire to inoculate trial proceedings against evidence of dubious scientific value." *Id.* at 39. As a result, "although polygraph evidence is not admissible in Kentucky, a defendant—and only the defendant—has the right, as a matter of trial strategy, to bring evidence of a polygraph examination

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[6] Appellant also directs us to *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), and *United States v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995). In *Mitchell*, this Court adopted the *Daubert* test for the admissibility of scientific evidence. 908 S.W.2d at 101. In *Sherlin*, the Sixth Circuit held that "[t]he decision to exclude from evidence the results of a polygraph examination is within the sound discretion of the trial court" and then outlined the analysis court must follow in exercising such discretion:

> In order to determine whether the results of a polygraph examination should be admitted at trial over an opponent's objections, this court has established a two-step analysis. First, the evidence must be relevant, and second, its probative value must outweigh the prejudice. *United States v. Barger*, 931 F.2d 359, 370 (6th Cir. 1991).

67 F.3d at 1216. However, without further explanation, we fail to see the connection between those cases and the matter before us.

before the jury to inform the jury as to the circumstances in which a confession was made." *Id.* at 40.

We do not believe the *Rogers* decision supports Appellant's contention. Although *Rogers* acknowledged the significance of the right to present a defense, it did so within the context of a confession; it did not contravene our precedent with respect to the results of polygraph examinations. In fact, the opinion itself reiterated that "polygraph evidence is not admissible in Kentucky." *Id.* at 40. Simply put, *Rogers* was a narrow decision that recognized the right of a defendant to set forth the relevant background—and, thus, an explanation—as to his or her confession.

Our decision in *Morton* establishes clear precedent as to the admissibility of the results of a polygraph exam. Precedent must be given considerable weight because *stare decisis* is "an ever-present guidepost" in appellate review and requires "deference to precedent." *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 795 (Ky. 2009). *Stare decisis* ensures that the law will "develop in a principled and intelligible fashion" rather than "merely change erratically." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky. 2008). "It is the difference between the 'rule of law' and the 'rule of man.'" *Sayre v. Commonwealth*, 2010-SC-000482-MR, 2011 WL 4431010, at *4 (Ky. Sept. 22, 2011).

We see no sound reason for ignoring our precedent in this case. *See Saleba v. Schrand*, 300 S.W.3d 177, 183 (Ky. 2009) (stating that we ignore *stare decisis* only for "sound reasons to the contrary"). Accordingly, we hold

that the trial court did not err by refusing to admit evidence that Appellant passed a state police-issued polygraph examination.

III. CONCLUSION

For the foregoing reasons, set out in section II(A)1 of this opinion, Appellant's murder conviction is reversed and the matter is remanded to the trial court for a new trial consistent with this opinion.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., concurs in part and dissents in part, believing that the evidence was sufficient to support a jury instruction on voluntary intoxication.

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