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RENDERED: MARCH 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000269-MR

RAY HACKER — APPELLANT

V.

ON APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
NO. 10-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Ray Hacker appeals as a matter of right from a judgment of the Jackson Circuit Court sentencing him to a thirty-year prison term for murder. Hacker raises six issues on appeal: 1) the trial court abused its discretion when it declined to instruct the jury on voluntary intoxication; 2) the admission of a police report from another state violated his right to confrontation under the Sixth Amendment; 3) the out-of-state police report was irrelevant and therefore should not have been admitted; 4) he suffered undue prejudice when he was cross-examined about his post-arrest silence; 5) he suffered undue prejudice when he was impeached with facts not presented in evidence; and 6) the cumulative effect of the trial errors warrants reversal. Finding that the contents of the out-of-state police report were erroneously admitted, we reverse the judgment and sentence of the Jackson Circuit Court and remand for further proceedings.

FACTS

Having recently relocated from Florida, Ray Hacker and girlfriend Gerilyn Walerski shared a rented room in the home of Jackson County, Kentucky resident Raymond Couch. On June 13, Couch's stepdaughter Connie Worthington, who was visiting Couch at the time, witnessed Hacker and Walerski drinking and bickering throughout the day. That afternoon, Couch and Worthington watched Hacker enter the living room, retrieve a rifle from behind a flag-stand, and head toward the bedroom that he shared with Walerski. After hearing what Worthington described as the sound of a B.B. gun firing, Couch confronted Hacker, who stated that "there was only one [bullet] in the gun and it's in the back of her head." Hacker then began to suffer a seizure and left the residence, but remained on the front porch until the police arrived. First responders found Walerski lying on the floor having suffered a fatal gunshot wound to the head.

Hacker was indicted on one count of first-degree murder and as a persistent felony offender. At trial, Hacker denied shooting Walerski. He testified that Walerski had taken a .22 caliber rifle from Couch's shed in order to shoot a raccoon in the backyard. Hacker alleged that he asked Walerski to remove it from the residence. According to Hacker, Walerski then attempted to shoot herself by propping the butt of the rifle against a doorknob and the barrel against her head. During his struggle to take the gun from her, Hacker alleged that the gun accidentally discharged, killing Walerski. The jury ultimately convicted Hacker of murder. This appeal followed.

ANALYSIS

I. Voluntary Intoxication Instruction Was Not Warranted By the Evidence.

Among Hacker's tendered jury instructions was a voluntary intoxication and second-degree manslaughter instruction. Defense counsel asserted that several witnesses described Hacker as intoxicated at the time of the crime, including a police detective who testified that Hacker was intoxicated hours after Walerski's shooting. This evidence, according to the defense, was sufficient to suggest that Hacker was too drunk to form the requisite intent for first-degree murder. The trial court declined to instruct the jury on voluntary intoxication on the grounds that there was sufficient evidence of Hacker's intent.

When the propriety of a trial court's refusal to instruct the jury is raised on appeal, the reviewing court must examine the totality of the evidence introduced to determine if the trial court abused its discretion. *Muse v. Commonwealth*, 551 S.W.2d 564 (Ky. 1977). Kentucky Revised Statute ("KRS") 501.080(1) provides that voluntary intoxication is a defense to a criminal charge if it "negatives the existence of an element of the offense." This Court has interpreted this statute to mean that a defendant is entitled to a voluntary intoxication instruction "when there is evidence that the defendant was so drunk that he did not know what he was doing[.]" *Nichols v. Commonwealth*, 142 S.W.3d 683, 688 (Ky. 2004) (*quoting Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002)). As such, a showing of "mere drunkenness" is insufficient to

meet the definition of voluntary intoxication, and will not support a voluntary intoxication instruction. *Rogers*, 86 S.W.3d at 44.

Sufficient evidence of voluntary intoxication may reduce an intentional murder to the lesser-include offense of second-degree manslaughter. *Fields v. Commonwealth*, 12 S.W.3d 275, 282 (Ky. 2000); *Slaven v. Commonwealth*, 962 S.W.2d 845, 857 (Ky. 1997). "Thus, if a jury is instructed on voluntary intoxication as a defense to intentional murder or first-degree manslaughter, it must also be instructed on second-degree manslaughter as a lesser included offense; and the failure to do so is prejudicial error." *Fields*, 12 S.W.3d at 282-83 (*citing Springer v. Commonwealth*, 998 S.W.2d 439, 454-55 (Ky. 1999); *Slaven,* 962 S.W.2d at 856-57)). Hacker maintains that he was entitled to a voluntary intoxication instruction because multiple witnesses testified that he was extremely intoxicated at the time of Walerski's death. Having reviewed the record and law, we conclude that the trial court did not abuse its discretion by rejecting the voluntary intoxication instruction here.

According to Hacker's own testimony, he imbibed five to six beers and one to two shots of vodka over the course of the entire day. His activities were, by his own account, seemingly normal—he drank coffee, watched television, spoke with Worthington and Couch, played with Worthington's grandson, and cared for his dogs. Worthington and Couch testified that Hacker and Walerski were very intoxicated and furiously bickering throughout the day, with Hacker often retreating to the front porch to avoid further confrontation with an

increasingly volatile Walerski. During a particularly heated exchange, Walerski poured an alcoholic beverage on Hacker and locked herself in the bedroom.

Worthington testified that the fighting between Hacker and Walerski eventually subsided by the afternoon. As Worthington and Couch napped in the living room with her grandson, Hacker "peeked" into the living room and retrieved a .22 caliber rifle from behind a large flag-stand. Worthington alerted Couch that Hacker had a gun, and then heard a "pop" sound coming from Walerski's bedroom. Couch testified that he entered the hallway as Hacker was leaving the bedroom. Hacker, apparently suffering the onset of a seizure, handed the rifle to Couch and went outside. Worthington called 9-1-1 after finding Walerski in the bathroom, having suffered a gunshot wound to the back of the head.

Officer Kevin Berry was the first to arrive on the scene. He testified that he witnessed Hacker lying on his back on the front porch as he approached the residence. Officer Berry gave three or four commands to Hacker, who failed to respond, acting "almost as if he didn't hear" the commands. He further testified that Hacker "seemed intoxicated," and that the smell of alcohol was "apparent throughout the home" and in the yard. Detective Mark Young with the Kentucky State Police interviewed Hacker approximately four hours after the incident. Detective Young testified that it was apparent that Hacker had been drinking, as he could "smell alcohol on and about [Hacker's] person." When he informed Hacker that he was being charged with the murder of

Walerski, Hacker denied the allegation and asked how soon he could return home.

The evidence here clearly established that Hacker was intoxicated to some extent on the day of the shooting. Neither party disputes this contention. However, the trial court abused its discretion in declining to give a voluntary intoxication instruction only if the evidence sufficiently establishes that Hacker "was so drunk that *he did not know what he was doing.*" *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010) (internal citations omitted) (emphasis supplied). On the contrary, the evidence here suggests that Hacker's behavior on the day of the shooting was normal and volitional. Hacker and Worthington both testified that he interacted normally with everyone in Couch's home, and even had the wherewithal to care for his dogs and entertain Worthington's young grandson in the yard. He appeared to all witnesses to be in control of his actions despite being "very drunk." *See id.* at 51 (defendant who was intoxicated but was aware of his surroundings and circumstances was not entitled to a voluntary intoxication instruction).

The smell of alcohol in the home and on Hacker's person, as observed by Officer Berry and Detective Young, is not enough to overcome the evidence that Hacker knew what he was doing. *Cf. Nichols*, 142 S.W.3d at 690 (intoxication instruction required where evidence established defendant was behaving wildly and could not control his actions). There was extensive testimony that heavy drinking occurred in the Couch home that day, even resulting in Hacker being doused with alcohol. Furthermore, Hacker, Couch, and Worthington all

testified that Hacker appeared to suffer a seizure after the shooting. Therefore, Hacker's inability or unwillingness to respond to Officer Berry's commands cannot be absolutely attributed to drunkenness without more evidence. Even if it could, this event occurred *after* the shooting—a fact that does not diminish the effect of the proof showing that Hacker was aware of his actions and behaving normally before the shooting. In sum, the evidence does not suffice to permit a finding that Hacker was so drunk at the time of Walerski's shooting that he did not know what he was doing. Accordingly, we find no abuse of discretion by the trial court in declining to instruct on voluntary intoxication.

II. The Erroneous Introduction of the Police Report Violated Hacker's Sixth Amendment Right to Confrontation.

During his direct examination, Hacker testified that he was on probation stemming from an incident in Florida where he was convicted of possessing a firearm as a felon. The Commonwealth asked Hacker about the Florida incident on cross-examination. Hacker testified that Walerski called 9-1-1 and reported that he had threatened to kill her and himself. Per the instructions of the 9-1-1 operator, Hacker secured the handgun in the residence, removed the clip, and walked outside where he was met by multiple police officers. When the prosecutor began to read from the Florida police report, defense counsel objected on the grounds that the police report was hearsay, and that any information contained in the report was collateral and not proof of any material fact. The trial court overruled the objection. The Commonwealth proceeded to read the police officer's report, which described Hacker as "agitated," noncompliant, and "screaming profanities." The report also included

Walerski's statements that she had been arguing with Hacker, that he had made threats against her life, and that he owned firearms.

Hacker challenges the reading of the police report on the basis that the report contained inadmissible hearsay not subject to an evidentiary exception, and that the admission of that evidence violated his rights under the Confrontation Clause of the United States Constitution. The Commonwealth contends that Hacker "opened the door" to the admission of the police report when he relayed his version of events on the stand, and that the Commonwealth was therefore entitled to read from the police report for the purposes of impeaching Hacker's testimony.

A police report may be admitted under the business records exception to the hearsay rule in Kentucky Rule of Evidence ("KRE") 803(6).[1] *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000); *see also* Robert G. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.65[10][a] at 696-97 (5th ed. 2013). However, if a party seeks to admit a police report under KRE 803(6), all portions of the report must conform to some hearsay exception. *Manning*, 23 S.W.3d at 614. The Florida report at issue clearly fails the test. The

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[1] KRE 803(6) provides in pertinent part: "Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

statements given by Walerski to the officer and recounted in the police report constitute inadmissible hearsay.

The Commonwealth does not challenge Hacker's correct assertion that the police report contains inadmissible hearsay, but rather contends that the trial court properly admitted the report after Hacker "opened the door" to further questioning about his Florida arrest and conviction during his direct and cross-examinations. As stated by this Court, "'opening the door' to otherwise inadmissible evidence is a form of waiver that happens when one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible proof." *Commonwealth v. Stone*, 291 S.W.3d 696, 701-02 (Ky. 2009) (*citing Purcell v. Commonwealth*, 149 S.W.3d 382 (Ky. 2004)). The issue is, therefore, whether the Commonwealth's use of the inadmissible police report was permissible for impeachment purposes after Hacker offered conflicting testimony concerning the nature of his prior conviction.

Impeachment of a witness through contradiction regarding collateral facts has been historically disfavored in the Commonwealth. *See Keene v. Commonwealth*, 210 S.W.2d 926 (Ky. 1948). The decision to permit or deny the admission of collateral evidence for the purposes of impeachment lies within the sound discretion of the trial court.[2] Here, Hacker, not the Commonwealth,

[2] As declared by this Court in *Commonwealth v. Prater*, "the trial court is in the best position to decide whether the facts and circumstances of that case present a scenario in which the evil of allowing a party to offer voluntarily what may be knowingly false testimony with impunity outweighs the evil of having to devote trial time to impeachment on collateral matters." 324 S.W.3d 393, 400 (Ky. 2010).

disclosed the existence of the prior conviction on direct examination, a common practice wherein the jury hears from the defendant "up front" rather than having it brought out by the prosecution on cross-examination. Hacker's admission was permissible pursuant to KRE 609, the rule which allows a party to impeach a witness by introducing evidence of a prior conviction. Under this rule, the witness against whom the conviction is admitted is free to disclose the "identity of the crime upon which the conviction is based," while the party seeking to use this evidence to impeach the witness may not. Thus, Hacker's disclosure of the felony for which he was convicted in Florida was proper. However, the Commonwealth's subsequent cross-examination was clearly improper under KRE 609. Hacker's felon status was relevant for purposes of "reflecting upon [his] credibility," KRE 609(a), as a witness and for no other purpose. The details of the Florida incident were not admissible but Hacker proceeded on cross-examination to give his version of events without objection by his counsel. Having given a version that differed from the police report, the Commonwealth, which was the party that actually opened the door to this line of questioning, proceeded to confront Hacker, again improperly, with the contents of the police report.

Simply put, the Commonwealth was not entitled to impeach Hacker through the use of the hearsay-laden police report. In *Commonwealth v. Stone*, this Court determined that the defendant's "misuse of his own self-serving out-of-court statement" did not authorize the Commonwealth's use of a hearsay

statement for impeachment purposes. 291 S.W.3d at 702. We quoted the following in *Stone*:

> The open door doctrine does not pave the way for responsive evidence just because it fits in the same general category as evidence already admitted. For example, admitting hearsay from one side does not mean the other side can offer hearsay. . . . The question in each case is not whether initial proof shares some common quality with proof offered in response. Rather, it is whether the latter answers the former, and whether it does so in a reasonable way without sacrifice of other important values.

Id. (*quoting* 1 Mueller & Kirkpatrick, *Federal Evidence*, § 1:12, 75–76 (3rd ed. 2007). The same principle rings even more true in the present case. The Commonwealth improperly solicited Hacker's version of what occurred in Florida and then used a police report for impeachment that was laden with inadmissible hearsay.

Furthermore, the police report was introduced in violation of Hacker's Sixth Amendment right to confrontation.[3] Under the United States Supreme Court's landmark *Crawford v. Washington* decision, testimonial, out-of-court statements cannot be introduced unless the defendant has, or had, an opportunity to cross-examine the declarant. 541 U.S. 36, 59 (2004); *see also Rodgers v. Commonwealth*, 285 S.W.3d 740, 745 (Ky. 2009). Without an opportunity to cross-examine the declarant, a defendant's right to confrontation under the Sixth Amendment is violated. Walerski's statements to law enforcement officers contained in the police report were testimonial in

[3] This issue is properly preserved by Hacker's objection to the reading of the portion of the police report relaying Walerski's statements to police officers concerning Hacker's Florida arrest.

nature, as they were "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52.

Having reviewed the record, we cannot say that the admission of the police report was harmless beyond a reasonable doubt. *See Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007) (recognizing that *Crawford* violations are subject to harmless error analysis). The impact of the contents of the police report, particularly Walerski's statements about Hacker's alleged past threats against her, was compelling, particularly in light of the fact that no one witnessed the shooting take place and that differing theories of how it occurred were offered at trial. *Cf. Turner v. Commonwealth*, 248 S.W.3d 543 (Ky. 2008) (the admission of an informant's hearsay statement in violation of *Crawford* was harmless error in a trafficking in a controlled substance case where the defendant was twice videotaped selling drugs to undercover police officers). Couch and Worthington testified that while they had heard Walerski threaten violence against Hacker, they never heard Hacker reciprocate, nor had they witnessed Hacker ever harm Walerski. Hacker testified that Walerski abused prescription drugs and alcohol and had tried to kill herself on previous occasions. In sum, the improper admission of the police report violated Hacker's Sixth Amendment right to confrontation as enunciated in *Crawford*

and the error cannot be deemed harmless. We therefore reverse and remand for a new trial.[4]

CONCLUSION

For the reasons stated herein, we reverse the judgment and sentence of the Jackson Circuit Court and remand for further proceedings consistent with this opinion.

All sitting. All concur.

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[4] Having determined that Hacker is entitled to a new trial, we decline to address the remaining arguments presented on appeal. However, we note that Hacker's objection to the Commonwealth's cross-examination about his post-arrest silence raises concern. The Supreme Court in *Doyle v. Ohio*, 426 U.S. 610 (1976) held that impeachment through the use of post-arrest, post-*Miranda* silence constitutes a due process violation. *See also Baumia v. Commonwealth*, 402 S.W.3d 530, 537 (Ky. 2013). Therefore, any questions on retrial concerning Hacker's post-arrest silence used to "impeach [his] exculpatory story" would raise serious *Doyle* concerns. *Doyle*, 426 U.S. at 620, n. 11.