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RENDERED: DECEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000321-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

AFFIRMING

Hope Renee White appeals as a matter of right from a judgment of the Wayne Circuit Court sentencing her to a twenty-five year prison term for murder. Ky. Const. § 110(2)(b). White raises three issues on appeal: 1) the trial court abused its discretion when it prohibited her from testifying about the results of her polygraph test; 2) the trial court abused its discretion when it denied her request to question the medical examiner about the victim's toxicology results; and 3) the trial court erred when it did not admonish the jury following a prosecutor's remark regarding a witness's testimony. We now affirm the judgment of the Wayne Circuit Court.

FACTS

On August 18, 2009, Appellant Hope White was indicted for the July 2008 murder of Julie Burchett. Burchett's body was found in an abandoned car in Monticello, Kentucky. Burchett had been stabbed nine times. White

was convicted and sentenced to serve a thirty-year prison term. This Court reversed and remanded White's conviction in *White v. Commonwealth*, No. 2010-SC-000626, 2011 WL 6826230 (Ky. Dec. 22, 2011), due to the trial court's failure to instruct the jury on the lesser included offense of first-degree manslaughter. On retrial, White was again convicted of murder and sentenced to serve a twenty-five year prison term. This appeal followed. Additional facts will be referenced as they become relevant to the issues discussed.

ANALYSIS

I. Trial Court's Exclusion of Polygraph Examination Results Was a Proper Exercise of Discretion.

Prior to the commencement of White's first trial, the Commonwealth moved to prohibit White from introducing the results of her own polygraph examination. The trial court ruled in favor of the Commonwealth and the evidence was excluded. On White's first appeal, this Court held that the trial court properly excluded the results of the polygraph examination. *White*, 2011 WL 6826230 at *6.

The Commonwealth again successfully moved to exclude the results of White's polygraph examination prior to the start of her second trial. Then, during the direct examination of Kentucky State Police Detective Douglas Boyd, the Commonwealth played an audio recording of an interview with White and detectives on the day preceding her arrest. In that unredacted recording from June 29, 2009, the jury heard several references to a polygraph examination, including a detective's statement that he "polygraphed" White, and statements from White herself that she was polygraphed on her birthday, that she "took

that lie detector test," and that she "passed all the lie detector tests," reiterating that she "passed them all." The recording from the 2009 interview lasted roughly twenty-nine minutes. The Commonwealth played a second audio recording from an earlier, July 28, 2008 police interview with White. In that recording, the jury heard White say, "You can do anything you want on me. Lie detector test, whatever. I did not do anything to that girl." Minutes later, a detective is heard saying, "If you're not guilty of this crime, I'd like to have a polygraph test, have you take one of those. That way I can clear you." White replied, "I'll do that for you." The Commonwealth then stopped the recording and the parties approached the bench.

In the ensuing bench conference, the Commonwealth stated that the forthcoming portion of the recording needed to be skipped over. White's defense counsel objected, arguing that evidence concerning the polygraph examination had already come in. In response, the Commonwealth claimed that the mere mention of the word "polygraph" was harmless and inadvertent, but that any reference to the results of the polygraph test would constitute reversible error. Defense counsel argued that the effect of the reference to the examination without revealing the result was prejudicial to White and would deprive her of a fair trial. Of course, there had already been reference to the results of the polygraph, including by White herself who was recorded as twice saying she "passed" the exam. After a lengthy deliberation, the trial court ultimately ruled that all further evidence regarding White's polygraph would be excluded based upon the earlier ruling of this Court. The trial court

admonished the jury not to consider any references to a polygraph examination in their deliberations.

On appeal, White contends that she should have been permitted to disclose the results of the polygraph examination in order to cure the Commonwealth's introduction of the inadmissible references to the polygraph test. White maintains that upon hearing that the officers would "clear" her if she took a polygraph examination, the jury would presume that she ultimately failed the examination given the fact that the investigation continued. She suggests that she should have been allowed to examine the detectives about the result of the examination and she should have been able to testify about it as well. White's argument presents the doctrine of curative admissibility, or "opening the door," where a party introduces inadmissible evidence in order to negate, explain, or rebut inadmissible evidence first offered by the opposing party. *See* Robert G. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 1.10[4], 41-45 (5th ed. 2013). This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

This Court has consistently held that the results of polygraph examinations are inadmissible.[1] *Stallings v. Commonwealth*, 556 S.W.2d 4 (Ky. 1977); *Baril v. Commonwealth*, 612 S.W.2d 739 (Ky. 1981); *Henderson v.*

[1] Given this longstanding law and particularly in light of this Court's ruling in this *very case* in the prior appeal, it is unclear why the Commonwealth could not take the time to listen to and redact these two, relatively brief recorded statements before the jury heard them.

Commonwealth, 507 S.W.2d 454 (Ky. 1974). We have likewise called for the exclusion of evidence that a witness or defendant has taken a polygraph examination for the purpose of bolstering or attacking credibility. *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky. 1984) (*citing Perry v. Commonwealth*, 652 S.W.2d 655 (Ky. 1983)). Going further, the Court in *Morgan v. Commonwealth* declared that the introduction of an inference that a defendant has taken and failed a polygraph examination is reversible error. 809 S.W.2d 704 (Ky. 1991). To put it plainly, "any reference to a polygraph examination is inappropriate." *Brown v. Commonwealth*, 892 S.W.2d 289, 291 (Ky. 1995).[2]

We agree that the Commonwealth's submission of the unredacted police interviews violated this Court's well-established prohibition against the introduction of evidence regarding a polygraph. However, White's case is readily distinguishable from *Morgan*, where a police interrogator testified that he possessed "special interrogation skills" and that the defendant's interrogation took place in a room with a polygraph machine. 809 S.W.2d at 705. As White concedes, and the Commonwealth reiterates, the jury heard from the 2009 police interview that she took and passed a polygraph examination. We reject the notion that the fact that the Commonwealth played the two interviews out of chronological order created the inference that White failed the exam, as the 2009 interview plainly suggests that she passed. Juries

[2] A narrow exception to the rule against polygraph results allows a defendant to bring evidence of a polygraph examination to "inform the jury as to the circumstances in which a confession was made." *Rogers v. Commonwealth*, 86 S.W.3d 29, 40 (Ky. 2002). This rule allows the defendant, "and only the defendant," the opportunity to place relevant evidence in the form of a polygraph examination "as to the credibility of his confession before the fact-finder." *Id.*

S.W.2d 473, 491 (Ky. 1999) (*overruled other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010)). The reasonable inference drawn thereon was not that she failed the examination, as White suggests, but that she took the examination at some time between the 2008 and 2009 interviews *and passed.* We conceive no prejudice where the net effect of the introduction of the two interviews was that the jury heard that the detectives asked White to take a polygraph examination, which she readily agreed to take, and ultimately passed.

White was not entitled to invoke curative admissibility in order to submit inadmissible evidence of the polygraph results. This Court has held that such evidence shall not be countenanced even in cases where the parties agree to the admissibility thereof. *See Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991); *Conley v. Commonwealth*, 382 S.W.2d 865 (Ky. 1964). The reason for our general exclusion of polygraph evidence is that such proof is considered unscientific and unreliable, yet wielding an "inherent propensity to influence the jury." *Morgan*, 809 S.W.2d at 706. The trial court was not compelled under the doctrine of curative admissibility to admit further evidence of White's polygraph results where this Court has declared that "under no circumstances should polygraph results be admitted." *Morton*, 817 S.W.2d at 222.

The trial court's decision to admonish the jury not to consider any references to the polygraph was appropriate under the circumstances. *See Stallings*, 556 S.W.2d at 4 (a police officer's testimony in murder prosecution

that defendant had refused to take lie detector test was erroneous but did not warrant reversal in view of fact that trial court, after objection, admonished jury to disregard such testimony.). "[A]n admonition is presumed to cure a defect in testimony." *Major v. Commonwealth*, 275 S.W.3d 706, 716 (Ky. 2009) (*quoting Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky.1993) *overruled on other grounds by Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky.1997)). Notably, the polygraph was not mentioned at any point following the admonition. Accordingly, the trial court's admonition was sufficient to cure the defect, if any, created by the Commonwealth's introduction of the interviews.

In sum, White was not deprived of her right to present a complete defense by the erroneous introduction of the police interviews. By virtue of the Commonwealth's misstep, the jury was permitted to hear that White voluntarily submitted to and passed a polygraph examination. The jury could not reasonably construe this evidence as creating an inference that White failed the polygraph examination. *Cf. Morgan*, 809 S.W.2d at 706. The trial court's decision to exclude any additional evidence of the polygraph results was in accordance with this Court's earlier decision which affirmed the exclusion of that evidence in White's first trial. As such, we find that the trial court did not abuse its discretion.

II. The Limitation of the Cross-Examination of the Medical Examiner Was Harmless.

Medical examiner Dr. Jennifer Schott performed the autopsy on Julie Burchett and testified at White's trial. Dr. Schott testified that Burchett

suffered nine stab wounds to her torso that injured her heart, lungs, and diaphragm, causing her death. On cross-examination, White asked Dr. Schott to explain "what was found" in Burchett's system. The Commonwealth objected on the grounds that the laboratory analyst who prepared the toxicology report was the proper witness to answer that question, and that White had not listed the analyst as a witness or noticed her as an expert pursuant to procedural rules. Therefore, according to the Commonwealth, the toxicology report was inadmissible.[3] White responded that toxicology report was a part of the medical examination process, and that only the defendant could object to a perceived violation of the defendant's right to confront a witness. The trial court sustained the objection, and defense counsel stated its intention to take testimony from Dr. Schott by avowal.

Dr. Schott's avowal testimony revealed that a multitude of drugs were present in Burchett's system at the time of her death. According to Dr. Schott's interpretation of the toxicology report, marijuana was not detected in Burchett's system. The laboratory analyst who prepared Burchett's toxicology report was not called to testify.

White now argues that her right to present a full and complete defense was violated when the trial court declined to allow the medical examiner to testify about the results of the toxicology report. White maintains that the toxicology report was significant to her defense to the extent that it

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[3] During the bench conference, White noted that the toxicology report had been admitted during the first trial.

contradicted Jason Miller's testimony (that he had smoked marijuana with the victim earlier in the day) and called into question his ability to recall the events of that day.[4] The Commonwealth contends that the results of the toxicology report were not relevant to the medical examiner's expert opinion because the drugs in Burchett's system did not cause her death, and would serve only to besmirch the victim, running afoul of Kentucky Rule of Evidence ("KRE") 403's prohibition against unduly prejudicial evidence.

A criminal defendant's constitutional right to present a defense is a fundamental one, anchored by both the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).[5] A trial court's exclusion of evidence that "significantly undermine[s] [the] fundamental elements of the defendant's defense" will "almost invariably be declared unconstitutional." *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-07 (Ky. 2003) (internal quotations omitted).

Under the principles set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court has declared that the admission of a forensic laboratory report (like the toxicology report in the instant case) without the live testimony

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[4] We reject the Commonwealth's claim that White's failure to argue before the trial court that the toxicology report would be used to impeach Miller's testimony rendered the argument unpreserved. White was under no obligation to disclose every element of her defense. KRS 500.070(2). The trial court's ruling limiting White's cross-examination of the medical examiner was sufficient to preserve the issue for our review.

[5] "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment[.]" *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984).

of the report's author is a violation of the defendant's right to confrontation. *Whittle v. Commonwealth*, 352 S.W.3d 898 (Ky. 2011). As for our present case, White deliberately waived her right to confront the report's author when she questioned Dr. Schott about the results of the report, attempting to elicit evidence that she wanted the jury to hear. *See Parsons v. Commonwealth*, 144 S.W.3d 775 (Ky. 2004) ("[A] criminal defendant may waive the constitutional right of confrontation."); *Illinois v. Allen*, 397 U.S. 337 (1970). The question presented here is whether under our evidentiary rules White was entitled to question the medical examiner about the results of the victim's toxicology examination.

The Commonwealth maintains that Dr. Schott could not testify about the results reflected on the report because the victim did not suffer a drug-related death. Therefore, according to the Commonwealth, Dr. Schott did not rely on the toxicology report in formulating her expert opinion. Pursuant to KRE 703(a), an expert witness may base his or her expert opinion on "facts or data . . . made known to the expert at or before the hearing," which may include the types of evidence the expert normally uses in his or her field to formulate an opinion. *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991). In *Baraka v. Commonwealth*, 194 S.W.3d 313, 315 (Ky. 2006), a defendant objected to a medical examiner's opinion that was based in part on disputed information concerning the victim's death provided to her by the police. In rejecting the defendant's position, the *Baraka* Court concluded that the challenged information from law enforcement was "exactly the kind of

information customarily relied upon in the day-to-day decisions attendant to a medical examiner's profession." 194 S.W.3d at 315.

Here, Dr. Schott explained that she submitted blood, urine, and cerebral spinal fluid samples from Burchett to the medical examiner's office. She went on to describe her autopsy report and the toxicology report as "obviously related" and usually combined. As expressed in *Baraka*, "there is absolutely nothing improper about basing an expert opinion on facts and data . . . made known to the expert at or before the hearing." *Id.* at 314-15 (internal quotations omitted). Because toxicology reports are typically relied upon by medical examiners to formulate opinions concerning the cause of an individual's death, Dr. Schott was properly subject to cross-examination under KRE 703(a) about the results of Burchett's toxicology screening.

Of course, evidence must first be relevant to be admissible, and the question of whether the results of the toxicology report were relevant is admittedly close. KRE 401; KRE 402. Jason Miller testified that he and a friend[6] spent several hours with Burchett on the day of her murder. He explained that he purchased marijuana and smoked it. When asked if Burchett smoked marijuana with him, Miller replied: "I'm sure, I can't remember clearly who all smoked, but I'm sure." He testified that while at a party at White's mother's house later that evening, he witnessed White confront

[6] Miller testified that Seth Frost spent the day and evening with Miller and Burchett, the victim. On direct examination, Frost denied ever meeting Burchett, attending a party with Miller, or seeing any of the other witnesses on the night in question.

Burchett about an alleged affair between Burchett and White's boyfriend. According to Miller, Burchett became upset and started crying, retreating to a bathroom where she remained for ten to fifteen minutes. Miller testified that when Burchett reemerged, White stabbed her multiple times.

The impeachment value of the evidence here, *i.e.*, that Burchett did not smoke marijuana despite Miller's account to the contrary, appears attenuated at first blush. However, we are mindful that a witness's credibility is always at issue and evidence relevant to that issue generally should not be excluded. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997) (*citing Parsley v. Commonwealth*, 306 S.W.2d 284 (Ky. 1957)). The absence of marijuana in the victim's system could only be revealed through the introduction of the toxicology report, and the trial court's limitation of White's cross-examination of Dr. Schott effectively excluded those results from evidence. Miller's testimony was directly at odds with White's defense that she was not at the party and did not stab Burchett, therefore we recognize some probative value in the results of the toxicology report. KRE 401. Furthermore, a limited inquiry as to the presence or absence of marijuana would safeguard against any undue prejudice implicit in the wholesale disclosure of the gamut of drugs[7] reflected in the report. *See Burton v. Commonwealth*, 300 S.W.3d 126 (Ky. 2009) (admission of urinalysis evidence had the improper effect of branding the victim

[7] On avowal, Dr. Schott testified that Burchett's blood tested positive for methamphetamine and diazepam. She stated that Burchett's urine tested positive for amphetamine, methamphetamine, hydrocodone, and oxycodone. Burchett's spinal fluid tested positive for benzodiazepines.

as a "drug user."). In short, we cannot perceive any great prejudice to the Commonwealth's case if White had been allowed to inquire about marijuana only.

However, even if the limitation on Dr. Schott's cross-examination constituted an abuse of discretion, the limitation was undoubtedly harmless. Beyond its narrow impeachment value as to Miller, we fail to recognize any significant relevance in the victim's non-use of marijuana. Moreover, Miller's testimony regarding the events at the party was largely corroborated by other eye-witnesses.[8] Law enforcement officers who encountered White on the night of the murder testified to observing blood stains on her shirt. A search of White's mother's house revealed blood stains beneath what appeared to be newly-laid flooring. Other witnesses testified to receiving phone calls from White where she allegedly conveyed details regarding the discovery of Burchett's body only known to the responding officers or someone who had moved the body. A deputy county jailer testified to witnessing an encounter between Miller and White where White threatened to "get even" with Miller. Also, a witness who was housed at the jail with White testified that White made multiple incriminating statements related to Burchett's murder, allegedly confessing to burning a bloody shirt and moving the body with the help of family members.

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[8] Adam Manning testified that he was also at the party with his friend, Scotty Stanton, on the night of the murder. Manning stated that he observed White and another woman shouting at one another, with White ultimately pulling a knife from underneath her shirt. He testified that he saw blood as the women grappled. Manning left the party with Stanton when he saw blood. Scotty Stanton testified that he observed two women fighting, but could not recall seeing a knife or blood.

The marginal probative value of the toxicology results notwithstanding, the trial court's limitation on White's cross-examination of the medical examiner did not "significantly undermine" a fundamental element of White's defense. *Beaty*, 125 S.W.3d at 206-07. White was given the opportunity to attack various aspects of the Commonwealth's case against her. In light of the Commonwealth's evidence, as well White's own theory of defense, Miller's account that Burchett smoked marijuana with him earlier in the day was not fundamental to her case. In sum, the limitation of the medical examiner's testimony did not infringe upon White's constitutional right to present a full and complete defense.

III. The Trial Court Did Not Err in Failing to Admonish the Jury When No Admonition Was Requested and No Manifest Injustice Resulted.

During the cross-examination of Detective Boyd, White asked a series of questions regarding the detective's interrogation tactics and training. White asked Detective Boyd how anyone would know if he was "misleading" with his responses considering that he was "trained" to mislead individuals in interrogation scenarios. The Commonwealth objected to the inference that Detective Boyd was lying on the stand, asserting that he "took an oath to tell the truth," but did not take the same oath prior to interrogating White. The trial court sustained the Commonwealth's objection. White now contends that the trial court erred when it failed to admonish the jury after the Commonwealth commented on Detective Boyd's truthfulness. White did not challenge the trial court's ruling on the objection, nor did she request an

admonition following the objection. As such, the error is unpreserved. We will proceed with the palpable error standard of review as set forth in RCr 10.26:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

We readily agree that no manifest injustice flowed from the Commonwealth's statement objecting to White's cross-examination of Detective Boyd. The reference that Detective Boyd "took an oath" to testify, but was under no such obligation during interrogations, did not improperly bolster the witness's credibility, nor was it inflammatory or devastating to White's defense. *See Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003); *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky. 2000) (no error where further admonition, which defendant did not request, would have cured inadmissible evidence). In fact, the statement only further elucidated White's argument that the investigators misled White during early interviews in order to elicit incriminating statements from her. Questions of witness credibility are resolved in the jury room. *Cross v. Clark*, 213 S.W.2d 443 (Ky. 1948). The jury was entitled to draw conclusions regarding Detective Boyd's truthfulness based on the facts developed throughout his direct and cross-examination, and nothing in the prosecutor's remark impeded the jury's ability to weigh Detective Boyd's credibility. The trial court did not proceed erroneously on this point, much less palpably so.

CONCLUSION

In sum, White was fairly tried and sentenced. For the reasons stated herein, we affirm the judgment and sentence of the Wayne Circuit Court.

All sitting. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion.

SCOTT, J., CONCURRING IN PART AND DISSENTING IN PART: Although I concur with the majority on the other issues, I must strongly dissent on Appellant not being allowed to introduce evidence to clarify that she did take and pass the polygraph referenced in the Commonwealth's proof. The Commonwealth "opened the door" here and it's only fair for Appellant to be allowed to fairly respond. What's sauce for the goose is sauce for the gander, too! Thus, I would reverse and order a new trial without any reference to the polygraph.

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