

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2014-SC-000646-MR

ANNE M. REARDON

APPELLANT

V. ON APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
NO. 13-CR-00134

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Anne M. Reardon of the wanton murder of her husband, Danny Reardon, and recommended a twenty-year sentence, which the trial court imposed.

Reardon appeals the resulting judgment as a matter of right.¹ She argues that two trial errors—both admittedly unpreserved for appellate review—resulted in palpable error warranting reversal of the judgment. She contends these errors occurred when the trial court allowed the Commonwealth’s witness to: (1) deliver testimony that he was not qualified as an expert to give when he observed that the murder weapon did not appear to have a “hair

¹ Ky. Const. § 110(2)(b).

trigger”; and (2) testify about the frequency of accidental discharges by semi-automatic pistols and revolvers.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Reardon and Danny had a tumultuous marriage. Danny suffered from bi-polar disorder and was, at least at one time, taking medication to treat his condition. Danny had a history of violence, and although Reardon’s daughter testified she had never seen Danny strike Reardon, she recounted to police an incident when Danny had pinned Reardon on the couch.

On the night Danny was killed, the two had been arguing for most of the day. Reardon testified that at the end of the evening she made up the couch for Danny to sleep on and returned to her room for bed. But, according to Reardon, she returned to the living room to confront Danny about his behavior and encourage him to be “nice,” because they had plans scheduled for the next several days. Reardon testified that Danny did not react well to this conversation and responded that it was taking everything he had to refrain from killing her.

After that conversation, Reardon retreated to her bedroom where she kept a .38 revolver under her pillow. She testified that she believed she emptied the revolver of bullets before returning with it to the living room. She told Danny to leave the home. He laughed and told her that she better shoot him because, if she did not kill him, he would kill her. He then laid his head on the armrest of the couch.

Reardon then claims that as she turned to leave the living room, the .38 caliber revolver accidentally fired a bullet that struck Danny in the top of the head and killed him.

At trial, Reardon's defense was that the shooting was accidental. She argued that the gun accidentally discharged and that the revolver had a "hair trigger." To dispute Reardon's defense, the Commonwealth called Detective Gabhart to testify. It is Detective Gabhart's testimony that is in dispute in this appeal. The jury convicted and sentenced her. She now appeals to this Court.

II. ANALYSIS.

A. Standard of Review.

Conceding that the alleged trial errors are unpreserved, Reardon requests review under Kentucky Rule of Criminal Procedure ("RCr") 10.26,² under which relief may be granted upon a showing of "palpable error."³ A finding of palpable error requires a showing that the alleged error affected the "substantial rights" of a defendant, for whom relief may be granted "upon a determination that manifest injustice has resulted from the error."⁴ And to find manifest injustice, the reviewing court must conclude that the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable."⁵

² Kentucky Rules of Criminal Procedure 10.26.

³ *Id.*

⁴ *Id.*

⁵ *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

B. Detective Gabhart's response to a question concerning the "Hair Trigger" Nature of the Revolver was not Improper Expert Testimony.

Reardon asserts that Detective Gabhart gave improper expert testimony when he testified that the revolver used to shoot Danny did not have a "hair trigger."

On the witness stand, Detective Gabhart explained the differences between a semi-automatic handgun and a revolver. He discussed the differences in how the weapons are loaded, how they are fired, and the mechanics behind the bullet fired from each weapon. While on the stand, Detective Gabhart dry-fired the revolver—meaning he pulled the trigger as if he were discharging the weapon. After doing so, the Commonwealth asked, "Is (sic) that feel to you like a hair trigger?" Detective Gabhart responded, "No sir, not at all."

Reardon argues Detective Gabhart's testimony that he did not believe the murder weapon exhibited a hair trigger was the type of opinion testimony that is properly limited to a witness who qualifies as a firearms expert. The Commonwealth argues that Detective Gabhart's testimony was lay-witness opinion testimony allowed under Kentucky Rule of Evidence 701.⁶

We would perhaps be skeptical of the ability of this witness to render a conclusory opinion as to whether the murder weapon had a trigger so delicately adjusted as to release the cock at the slightest touch.⁷ But that is not what happened here. In our view of the testimony, this response to the prosecutor's

⁶ KRE 701.

⁷ *Hair Trigger*, Webster's Third New International Dictionary (3rd ed. 1961).

question was simply this witness's observation—a comment from a witness who had some professional familiarity with handguns—that he did not detect the presence of a hair trigger. The witness did not offer expert opinion, as Reardon insists. So Reardon fails here to establish any error and certainly fails to convince us of an error affecting substantial rights resulting in manifest injustice.

C. Detective Gabhart's Testimony of Never Hearing of a Revolver Accidentally Discharging was Likely Irrelevant But Does Not Constitute Palpable Error.

Reardon next argues that Detective Gabhart gave improper testimony when he testified that he had never known a revolver to misfire. Reardon argues that this was once again expert testimony and improper. The Commonwealth asserts that this was simply a statement of fact given from Detective Gabhart's personal knowledge. The testimony in question happened during the following exchange:

Commonwealth: Let me ask you, as far as the semi-automatic pistol that you carry on yourself that feeds them through the magazine, are you aware of or have you ever heard of one of those misfiring?

Witness: A semi-automatic?

Commonwealth: Yes.

Witness: Uh, yes, I have.

Commonwealth: Have you ever heard of a revolver misfiring?

Witness: Uh, not to my knowledge. No.

Reardon argues that this testimony was expert testimony and improper. The Commonwealth rebuts this argument saying that the testimony was simply

a statement of fact, and did not fall under KRE 701 or 702. We agree that the testimony was not given as expert testimony, but the testimony was improper.

Evidence used during trial must conform to KRE 401.⁸ KRE 401 provides that evidence introduced must be relevant.⁹ Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁰

Detective Gabhart’s testimony did not satisfy KRE 401. His testimony fails the relevancy equation because it is simply a broad observation that is not tailored to the facts at issue. The issue in Reardon’s case was whether the gun used accidentally discharged. Detective Gabhart’s testimony does nothing to lead a jury to determine whether the revolver in question had more or less of a tendency to accidentally discharge. Instead, his testimony involves the accidental discharge of the revolvers of which he is aware, not taking into account the different models, safety features, calibers, and manufacturers. Furthermore, Reardon notes that there was no evidence showing that Detective Gabhart had done any research on the issue or was particularly aware of accidental discharges of revolvers. Detective Gabhart’s generalization of the likelihood of accidental discharge based on his experience fails to advance resolving the question at hand, whether it is more or less probable that Reardon’s revolver accidentally discharged.

⁸ KRE 401.

⁹ *Id.*

¹⁰ *Id.*

Furthermore, even if the testimony were to be considered relevant, KRE 403 provides a balancing test when deciding if relevant evidence should be excluded.¹¹ 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...”¹² Detective Gabhart’s testimony likely fails the balancing test and provides testimony which is far more prejudicial than probative.

While Detective Gabhart’s unobjected-to testimony was likely irrelevant, we do not have the benefit of the trial court’s KRE 403 analysis. But we are satisfied nevertheless that Reardon has failed to establish that the potential error rises to the level of palpable error.

III. CONCLUSION.

For the reasons state above, we affirm the judgment of the trial court.

All sitting. All concur.

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¹¹ KRE 403.

¹² *Id.*