

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2017-SC-000158-MR

NORMAN BARASSI

APPELLANT

V. ON APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES CLAUD BRANTLEY, JUDGE
NO. 14-CR-00166

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Norman Barassi of murder and tampering with physical evidence and recommended a sentence of life imprisonment. The trial court entered judgment accordingly, from which Barassi appeals to this Court as a matter of right.¹

He contends that error, preserved or unpreserved by contemporary objection, occurred when (1) the trial court improperly excused a prospective juror for cause, (2) the Commonwealth introduced a lab report in violation of his right to confront witnesses, and (3) the Commonwealth's witness delivered prejudicial hearsay testimony. Upon review of the record, we affirm the trial court's judgment, because we find that none of these claimed errors warrants reversal.

¹ Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL BACKGROUND.

Barassi was convicted of the murder of P.J. Phelps, who was stabbed to death and whose body was later found in a farm pond, stripped down to socks and underwear.

Barassi's defense at trial was that Zach McPeak, not he, stabbed Phelps. Barassi asserted that he, McPeak, and Phelps were walking in the woods when suddenly McPeak began stabbing Phelps. Barassi alleges that he attempted to step in, pulling McPeak off Phelps, but that ultimately Phelps died of the knife wounds inflicted by McPeak.

Contrary to Barassi's version of the incident, McPeak testified at trial that Barassi, not he, was the perpetrator. Before trial, McPeak pleaded guilty to complicity to first-degree manslaughter in exchange for testifying against Barassi. He testified that Barassi killed Phelps by stabbing him and attempted to hide the body in a nearby pond.

II. ANALYSIS.

A. The Trial Court Did Not Abuse its Discretion in Dismissing Prospective Juror L.

"A trial court's decision on whether to strike a juror for cause must be reviewed for abuse of discretion."² As an appellate court, we give great deference to the ruling of the trial court, recognizing that a trial court is in a better position to make decisions about the demeanor and credibility of

² *Shave v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007) (citations omitted).

prospective jurors based on first-hand observation in the real-time context of the trial.³

The issue at hand revolves around the trial court's decision to dismiss a particular prospective juror because of questionable impartiality. During the jury-selection process, Prospective Juror L disclosed to the trial court that her son had been convicted of attempted murder. The prospective juror's son spent nine years in the penitentiary because, as she perceived it, her son had been "in the wrong place at the wrong time."

The trial court inquired of Prospective Juror L whether she believed her son had been treated fairly, to which she responded that she did not believe so. Appearing uncomfortable, she stated that she would attempt to be fair.

Prospective Juror L went on to disclose that she believed the police had treated her son unfairly. And when asked if she believed her son had been treated unfairly by the prosecution she said, "Like I said, it was mainly like he was in the wrong place at the wrong time, but you know like I don't know."

The trial court continued to examine the prospective juror, explaining to her that during the trial, witnesses will testify to facts similar to those that might have resulted in her son's conviction. The trial court then asked Prospective Juror L if this type of testimony would cause her to view either side in a more or less favorable way. She stated, "It may cause me to favor it. I don't. Because I don't (inaudible) because he might say that he was in the same position as my son was in."

³ See *Knuckles v. Commonwealth*, 315 S.W.3d 319, 325 (Ky. 2010).

After this inquiry, the trial court dismissed Prospective Juror L for cause. In doing so, the trial court noted that the prospective juror was hesitant in her response that she would “try to be fair” and that the facts of the case were similar to those in which she believed her son to have been treated unfairly by police and the prosecution.

Based upon our review of the trial record, we are unwilling to say that the trial court abused its discretion in dismissing this prospective juror for cause.

B. The Violation of Barassi’s Sixth Amendment Right to Confront a Witness was Not Palpable Error.

Barassi’s second argument involves an alleged abridgement of his right to confront witnesses who appeared against him at trial, a right guaranteed under the Sixth Amendment of the United States Constitution.

During trial, the Commonwealth sought to introduce two separate laboratory reports. The Commonwealth introduced these lab reports via a testifying witness, Lyle Hall, who is a DNA analyst for the Kentucky State Police. One report was an analysis done to detect the presence of human blood while the other was a DNA report confirming the presence of human blood and matching this blood to the victim.

Shane Hardison, an analyst with the Kentucky State Police, prepared the first report, which detailed the testing of some eight items for the presence of human blood. Lyle Hall, the testifying witness at trial, prepared the second report which established that some of the blood tested did in fact belong to the victim. Shane Hardison did not testify at trial.

When the Commonwealth sought to introduce these reports, Barassi objected, stating as grounds for the objection simply that the reports were “too vague.” He did not say that he was objecting on confrontation-clause grounds. Barassi’s concern, as expressed at trial, was that the reports indicated blood at the scene under broad, nondescript titles. In his reply brief on appeal, Barassi states, “while defense counsel did not specifically state that he was objecting under the Confrontation Clause, the implication was clear.” We cannot agree that the claimed implication was clear. Barassi’s objection for vagueness did not adequately alert the trial court that Barassi was objecting because the presentation of one or both of these reports amounted to a confrontation-clause violation. So we must treat this issue as unpreserved, and we will reviewed it for palpable error in accordance with RCr 10.26.⁴

Under RCr 10.26, one must show “palpable error.”⁵ Palpable error requires a showing that the alleged error affected the “substantial rights” of a defendant and that relief may be granted “upon a determination that manifest injustice has resulted from the error.”⁶ To find manifest injustice, we must conclude that the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be “shocking or jurisprudentially intolerable.”⁷

⁴ Kentucky Rules of Criminal Procedure 10.26.; *Walker v. Commonwealth*, 349 S.W.3d 307, 313 (Ky. 2011) (“alleged constitutional errors, if unpreserved, are subject to palpable error review) (citation omitted).

⁵ *Id.*

⁶ *Id.*

⁷ *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

We first acknowledge that the introduction of the Hardison report violated Barassi's right to confrontation. The United States Supreme Court has held that a criminal defendant has the right to examine individuals, like the KSP analysts in the present case, when the government intends to introduce reports produced by these individuals "solely for an evidentiary purpose and made in aid of a police investigation."⁸ The Court went on to say that this type of report "ranks as 'testimonial' within the meaning of the Confrontation Clause."⁹ And when something is identified as testimonial in nature, "absent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant is] entitled to 'be confronted with' the analysts at trial."¹⁰

Although reviewed under a stricter standard, in *Whittle*, we held that the introduction of a lab report analyzing the composition of a drug for proving a trafficking charge, without giving the defendant the ability to cross-examine the analyst, was not harmless error.¹¹ We stated, "Whether the substance [the defendant] was accused of trafficking was actually cocaine was an element of the offense. That element was proven almost solely by the lab report in this case."¹² Therefore, "this Court cannot say that [the defendant's] inability to

⁸ *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011).

⁹ *Id.*

¹⁰ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

¹¹ *Whittle v. Commonwealth*, 352 S.W.3d 898 (Ky. 2011).

¹² *Id.* at 906.

confront the person who made the lab report was harmless beyond a reasonable doubt.”¹³

But in Barassi’s case, the lab report indicating the presence of human blood at the scene was not vital for the Commonwealth’s prosecution. Barassi argues that it was an important piece of the Commonwealth’s proof because if it were not then why would the Commonwealth seek to introduce the evidence in the first place. But even in his own defense, Barassi does not dispute the fact that the victim was stabbed to death at or near the location from which the tested items were taken. On the contrary, he accepts that the victim was stabbed to death but denies that he did the stabbing, placing the blame for the act on his companion, McPeak. Arguably, the KSP blood analysis supports Barassi’s theory of the case as much as the Commonwealth’s theory.

The error here did not greatly inure to the benefit of the of Commonwealth’s case, nor was it greatly prejudicial to Barassi’s alternative-perpetrator defense. Therefore, we hold that the error was not palpable.

C. The Hearsay Statement was not Palpable Error.

Barassi’s third alleged error is unpreserved by objection at trial, so we review it under a palpable error standard. During the trial, the Commonwealth solicited hearsay testimony from Trevor Plain, a lay witness who testified that he received a phone call from an otherwise unidentified female who stated that

¹³ *Id.*

the victim's body had been found and "Norm had done it." Plain's testimony is a hearsay statement.¹⁴

Hearsay is inadmissible at trial, but we cannot say that Plain's testimony relating this hearsay rose to the level of palpable error. Barassi concedes in his response brief that Plain's testimony was "certainly brief" and that the Commonwealth did not rely on this testimony in its closing, nor did the Commonwealth mention the hearsay comment again throughout trial. As a result of the very limited nature of the statement, we find no reason to believe that it created any serious injustice or seriously affected the fairness of the trial. We will not regard this as a palpable error.

III. CONCLUSION.

Finding no reversible error, the judgment is affirmed.

All sitting. All concur.

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¹⁴ Kentucky Rules of Evidence 801(c) ("a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").