

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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

2018-SC-000374-MR

NORVIN SPROWS

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
NOS. 17-CR-001609 AND 18-CR-000958

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Norvin Sprows appeals from a judgment of the Jefferson Circuit Court convicting him of first-degree assault, first-degree burglary, unlawful imprisonment, and of being a first-degree persistent felony offender, and sentencing him to 20 years in prison. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2017 Sprows and his pregnant girlfriend, Lasha Scott, had been living rent free with Robert Farris at Farris's apartment. Around midnight on April 1, 2017, Officers Holman and Durett responded to a call made by Farris seeking their assistance in asking Sprows to leave the apartment; Farris wanted Sprows to leave because they had been arguing. The officers responded to the scene and told Farris they could not make Sprows leave because he lived there. Nevertheless, Sprows voluntarily packed his belongings and left, but Farris permitted Scott to remain because she was pregnant.

Not long after Sprows had vacated the apartment, three men arrived, forced their way into the apartment, and beat Farris with sticks and 2x4's, resulting in multiple serious injuries, including the loss of an eye and permanent damage to his hearing.

After the assault Farris went to a nearby liquor store where police were called. Officer Holman was again one of the responding officers, and Farris identified Sprows to her as one of his assailants. Farris was also able to identify one of the other attackers, but he was unable to identify the other with certainty.

Farris was transported from the liquor store to the hospital where, in contradiction of his initial denial, he was determined through testing to have been intoxicated at the time of his admission. Farris later admitted he had ingested alcohol and cocaine that evening. Several days later, Farris was again interviewed, and on this occasion as well, he identified Sprows from a photo pack lineup as one of his assailants. Farris also steadfastly identified Sprows at trial as one of his attackers.

It is undisputed that Farris suffers from mental health issues. Sprows engaged in pretrial efforts to penetrate the psychotherapist-patient privilege contained in KRE¹ 507(b) by invoking the procedures contained in *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003), to obtain access to Farris's mental health records. Sprows's purpose was to inquire into those

¹ Kentucky Rules of Evidence.

issues to see if the records contained information related to Farris's credibility as a witness.

Following a jury trial, Sprows was convicted of first-degree assault, first-degree burglary, unlawful imprisonment, and of being a first-degree persistent felony offender. Although the jury recommended a sentence of 30 years in prison, the trial court sentenced him to 20 years. This appeal followed.

II. FAILURE TO CONDUCT AN *IN CAMERA*

REVIEW OF CENTERSTONE RECORDS

Sprows contends the trial court erred by denying his motion to obtain Farris's mental health records from Centerstone, a drug rehabilitation and mental health facility for the poor, for the trial court to conduct an *in camera* review of the records for exculpatory evidence. It was undisputed that because of his mental health issues and substance abuse problem, Farris had received treatment and care from Centerstone.

During discovery, the Commonwealth provided Sprows with Farris's University of Louisville hospital medical records from the assault, which indicated Farris had been diagnosed with mental health related issues. In addition, Sprows became aware that in 2015 Farris had been evaluated for competency to stand trial by KCPC² in connection with a felony criminal charge against him.

² Kentucky Correctional Psychiatric Center.

With this information, Sprows filed a motion for disclosure of the KCPC records under seal for inspection, or, alternatively, for an *in camera* review of those records by the trial court for exculpatory evidence pursuant to *Barroso*. Sprows later supplemented this motion to state he had a “reasonable belief that [the] KCPC records contain exculpatory information [] because the University of Louisville Hospital Records, submitted as discovery, identify that Mr. Farris has been diagnosed with paranoid schizophrenia, post-traumatic stress disorder, depression, ETOH,³ substance abuse and anxiety. For each one of those diagnoses the ‘life cycle status’ was reported ‘active.’”

The trial court granted the motion and conducted an *in camera* review of the KCPC records. At a pretrial conference, the court reported the results of its *in camera* review to the parties. It reported that “there was no diagnosis that would, for any type of mental illness, that would affect this, and the only thing in there that even could be remotely, was there was a suggestion of malingering.”

Through other evidence developed during the proceeding, Sprows also learned Farris was currently a patient at Centerstone and requested the trial court also subpoena and conduct an *in camera* review of those records. In support of his motion, Sprows stated his request was “essentially the same one that was done before in regard to KCPC, but this time with Centerstone.”

³ ETOH refers to alcohol abuse.

Finding no basis to do so under the *Barroso* standard, the trial court denied that motion. Sprows contends the trial court erred in this regard.

The day of trial, the Commonwealth moved to exclude all of Farris's mental health records from trial. Sprows responded that Farris's paranoid schizophrenia diagnosis and substance abuse history were relevant to his credibility and, accordingly, proper subjects for cross-examination. The Commonwealth reiterated its objection to Sprows' usage of Farris's mental health records, but it conceded that the medical records established a good faith basis for Sprows to question Farris about whether he had been intoxicated at the time of the assault.

The trial court stated it was unaware of a paranoid schizophrenia diagnosis because his KCPC report failed to mention it. While the trial court found that paranoid schizophrenia "is a significant diagnosis," it nonetheless ruled Sprows could not cross-examine Farris on this diagnosis, although it further ruled that Sprows could cross-examine Farris concerning his intoxication the night of the assault. Sprows did, however, take Farris's mental health testimony by avowal, and that testimony is substantially set forth in the Commonwealth's brief. The trial court also permitted Sprows to cross-examine Farris concerning his ongoing treatment at Centerstone concerning his current PTSD diagnosis related to the assault because the Commonwealth had raised the issue on direct examination.

In his motion for the Centerstone records, Sprows stated Farris's psychotherapy records from Centerstone "would reveal mental infirmities" that

were relevant and admissible for the jury's use in assessing Farris's credibility, and he had "a reasonable belief that these records contain exculpatory information . . . because the known types of diagnosis and treatment Centerstone provides." He reiterated this argument at trial.

Sprows herein reaffirms this argument stating, "Mr. Farris' paranoid schizophrenia was relevant to his credibility, and it was crucial to his defense that he be permitted to question Mr. Farris' credibility." As we construe his argument, Sprows alleged grounds for relief is that the trial court foreclosed his efforts to show that Farris had an ongoing and current diagnosis of paranoid schizophrenia, which, if true, affected Farris's credibility as an eyewitness who identified Sprows as one of the perpetrators of the assault. Sprows asserts he was entitled to impeach Farris at trial because of Farris's paranoid schizophrenia.

KRE 507(b), defining the psychotherapist-patient privilege, provides, in relevant part, as follows:

(b) General rule of privilege. A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Exceptions. There is no privilege under this rule for any relevant communications under this rule:

(1) In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(2) If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or

(3) If the patient is asserting that patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

Because none of the exceptions apply, absent some superseding authority, Sprows would not be entitled to Farris's Centerstone mental health records under KRE 507(b).

In *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994), we held that a criminal defendant was entitled to discover exculpatory evidence contained in the psychiatric treatment records of a witness for the prosecution. *Id.* at 701-03. While *Eldred* was a pre-rules case, we later adopted the same rule in *Barroso*. In *Barroso* we held, “[i]f the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness’s ability to recall, comprehend, and accurately relate the subject matter of the testimony, the defendant’s right to compulsory process must prevail over the witness's psychotherapist-patient privilege.” 122 S.W.3d at 563.

Citing *State v. Esposito*, 192 Conn. 166, 471 A.2d 949, 955 (1984), we further explained:

The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. If as a result of a mental condition such capacity has been substantially diminished, evidence of that condition before, at and

after the occurrence and at the time of trial is ordinarily admissible for use by the trier in passing on the credibility of the witness.

Barroso, 122 S.W.3d at 562.

On the issue of what types of mental health evidence may be probative enough to overcome KRE 507(b), we stated as follows:

Certain forms of mental disorder have high probative value on the issue of credibility. Although the debate over the proper legal role of mental health professionals continues to rage, even those who would limit the availability of psychiatric evidence acknowledge that many types of “emotional or mental defect[s] may materially affect the accuracy of testimony; a conservative list of such defects would have to include the psychoses, most or all of the neuroses, defects in the structure of the nervous system, mental deficiency, alcoholism, drug addiction and psychopathic personality.”

Barroso, 122 S.W.3d at 562 (quoting *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983) (quoting Michael Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 Cal. L.Rev. 648, 648 (1960))).

In assessing how trial courts should approach the issue, we explained as follows:

Factors a court should consider in allowing such evidence are the nature of the psychological problem, the temporal recency or remoteness of the condition, and whether the witness suffered from the condition at the time of the events to which she is to testify. For example, a mental illness that causes hallucinations or delusions is generally more probative of credibility than a condition causing only depression, irritability, impulsivity, or anxiety.

Barroso, 122 S.W.3d at 562-63 (quoting *People v. Anderson*, 25 Cal.4th 543, 106 Cal.Rptr.2d 575, 22 P.3d 347, 391 (2001) (Kennard, J., concurring) (internal citations and quotations omitted)).

In *Barroso* we also established rigid safeguards to stave off fishing expeditions into a witness's mental health records and "unrestrained foray[s] into confidential records in the hope that the unearthing of some unspecified information would enable [the defendant] to impeach the witness."

Id. at 563 (quoting *Commonwealth v. Bishop*, 416 Mass. 169, 617 N.E.2d 990, 997–98 (1993) (internal quotation omitted)). In this same vein we further stated:

A person's credibility is not in question merely because he or she is receiving treatment for a mental health problem. To subject every witness in a criminal prosecution to an *in camera* review of their psychotherapist's records would be the invasion of privacy which the psychotherapist-patient privilege is intended to prevent.

Id. (quoting *People v. Pack*, 201 Cal.App.3d 679, 248 Cal.Rptr. 240, 244 (1988) (citations omitted), overruled on other grounds by *People v. Hammon*, 15 Cal.4th 1117, 65 Cal.Rptr.2d 1, 938 P.2d 986, 993 (1997)).

Finally, in assessing whether an *in camera* review is necessary in a particular case, we held that "*in camera* review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." *Barroso*, 122 S.W.2d at 564. That "reasonable belief" standard confers the trial court with discretion in determining whether an *in camera* review is necessary. *See id.* Then, "[i]f the *in camera* inspection reveals exculpatory evidence, i.e., evidence favorable to the accused and material to guilt or punishment, including impeachment evidence, that evidence must be disclosed to the defendant if

unavailable from less intrusive sources.” *Id.* (citations omitted). *See also Richardson v. Commonwealth*, 161 S.W.3d 327, 329 (Ky. 2005).

As we construe his arguments, Sprows sought the Centerstone records to determine if they confirmed a diagnosis of paranoid schizophrenia under the premise that, if so, he could then use that information to undermine Farris’s credibility as a witness. This argument presupposes that such a diagnosis would be admissible at trial to impeach Farris’s capacity for truthfulness, and/or his ability to recall, observe, recollect, and narrate what occurred the night of the assault, and his ability to identify Sprows, with whom Farris was intimately familiar, as one of the perpetrators.

“‘Paranoid schizophrenia’ is defined as ‘a psychotic state characterized by delusions of grandeur or persecution, often accompanied by hallucinations.’” *May v. Heckler*, 607 F.Supp. 667, 670 n.3 (D.C. Wis. 1985) (quoting *Illustrated Medical Dictionary* 1386 (25th ed. 1974)). “Paranoid schizophrenia is broadly defined as a psychotic disorder causing hallucinations and other major disturbances in thought, mood, perception, orientation, memory, and behavior, and characterized by one or more systematized delusions of persecution or danger.” *Nunnally v. MacCausland*, 996 F.2d 1, 6 n.10 (C.A.1 (Mass.) 1993) (citing *Sloane–Dorland Annotated Medical–Legal Dictionary*, supp. at 467–68 (1992)). “Schizophrenia is a serious mental disorder in which people interpret reality abnormally. Schizophrenia may result in some combination of hallucinations, delusions, and extremely disordered thinking and behavior that impairs daily functioning and can be disabling.” *Schizophrenia: Symptoms &*

Causes, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes/syc-20354443> (last visited May 20, 2019).

Based upon the above definitions, it may often be the case that a defendant will be entitled under *Barroso* to obtain relevant mental health records to explore the ramifications of a crucial witness who has been diagnosed with paranoid schizophrenia. As noted in the above definitions, such witnesses may suffer from some combination of hallucinations, delusions, extremely disordered thinking, and an inability to interpret reality normally, which in turn may call into question that witness's ability to observe, recollect, and narrate an occurrence accurately.

A fundamental flaw in Sprows's argument, however, is the absence of any authority that, even if it is true that Sprows had active paranoid schizophrenia at the time of the assault and at trial, it would have any bearing upon his capacity for truthfulness and ability to recall and identify his familiar former roommate under the circumstances presented in this case.

Farris was closely acquainted with Sprows, his former roommate, who was undisguised during the attack. Indeed, Farris testified he was able to identify Sprows by his voice as one of the home invaders who was beating on his door and window before entering. Moreover, Farris clearly had every incentive to bring the actual perpetrators, who had so terribly and permanently damaged his life, to justice. Also, Farris, as demonstrated by his testimony in this case, never wavered in his identification of Sprows as one of his attackers

from only minutes after the attack through the trial one year later. Under these circumstances and upon this record, we are unable to identify any plausible theory that any mental illness Farris may have would have lead him to fabricate, or be mistaken about, the identity of his attackers.

Further, even if the Centerstone records contained evidence that Farris suffered from active paranoid schizophrenia, there was no indication such evidence could qualify as “exculpatory evidence” as required under the *Barroso* standard. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) (A conclusion will qualify as scientific knowledge if the proponent can demonstrate that it is the product of sound “scientific methodology” derived from the scientific method.); KRE 702 (requiring the need for expert testimony to explain scientific evidence); *Stringer v. Commonwealth*, 956 S.W.2d 883, 889 (Ky. 1997) (“Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, and when the subject matter is outside the common knowledge of jurors.” (citations omitted)).

Sprows failed to carry his burden of showing that even if Farris did have an active diagnosis of paranoid schizophrenia, that such would have been of any relevance to indicate the condition would have any tendency to undercut Farris’s capacity for truthfulness or to recall the events surrounding the assault, including the identification of his roommate as one of the attackers.

We conclude the trial court did not abuse its discretion by denying Sprows’s motion to conduct an *in camera* review of Farris’s Centerstone mental

health records. *Sheets v. Commonwealth*, 495 S.W.3d 654, 672 (Ky. 2016) (“With this in mind, we conclude that the trial judge acted within his discretion in finding that [the defendant] failed to proffer sufficient proof of a reasonable belief that the requested records would contain exculpatory or impeachment evidence.”).

In any event, we are unable to properly analyze this issue because the appellate record does not contain the Centerstone records which are the subject of this argument. In the absence of those records, we are unable to assess whether Sprows was prejudiced by the trial court’s failure to undertake an *in camera* review of them. As we stated in *Commonwealth v. Thompson*, “[w]e will not engage in gratuitous speculation as ... based upon a silent record.” 697 S.W.2d 143, 145 (Ky. 1985). Rather, “when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Id.* (citation omitted). As such, in a situation such as this where the trial court denies a motion for an *in camera* review of a witness’s mental health records, in order to properly preserve the issue for appellate review, it is incumbent upon the defendant to nevertheless assure that those records are filed into the trial court record and transmitted to the appellate court at the time of the appeal.

Finally, whether treated as a constitutional level error or a non-constitutional error, the evidence is overwhelming that after Farris called the police on Sprows and effectively kicked him out of the apartment, Sprows retaliated by returning to the apartment and assaulting him. Moreover, Farris,

from minutes after the assault through trial steadfastly identified his former roommate as one of the perpetrators. Further, Sprows has not identified a plausible alternative perpetrator of, or motive for, the horrific beating. Under these circumstances, we conclude any error of the trial court in denying Sprows to conduct an *in camera* review of the Centerstone records was harmless error. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009).

III. LIMITATION ON CROSS-EXAMINATION OF THE VICTIM

Citing his general right to present a defense as explained in *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Davis v. Alaska*, 415 U.S. 308 (1974); *Yates v. Commonwealth*, 430 S.W.3d 883 (Ky. 2014); and *Parsley v. Commonwealth*, 306 S.W.2d 284 (Ky. 1957), Sprows contends the trial court erred by disallowing him to cross-examine Farris concerning his alleged active paranoid schizophrenia diagnosis. Sprows argues that “Mr. Farris’ paranoid schizophrenia was relevant to his credibility, and it was crucial to his defense that he be permitted to question Mr. Farris’ credibility.”

To be admitted at trial, evidence must be relevant. KRE 402. 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.” KRE 401. Assuming Farris’s paranoid schizophrenia diagnosis was of some relevance in this case, nevertheless, even 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, or by considerations of undue delay, or needless presentation of cumulative evidence.” KRE 403; *Moorman v. Commonwealth*, 325 S.W.3d 325, 332–33 (Ky. 2010). Rulings on the admissibility of evidence by the trial court are not disturbed on review in the absence of an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

As discussed above, Sprows has failed to establish an evidentiary foundation for his hypothesis that a diagnosis of paranoid schizophrenia is relevant under the circumstances of this case, that is, that such a diagnosis could possibly have any relevance to Farris’s identification of Sprows, with whom Farris was intimately acquainted, as one of the perpetrators of the assault.

In the absence of an expert witness who could explain that a paranoid schizophrenic would be likely to fabricate a witness identification, or be unable to perceive and recall the events surrounding the assault under these circumstances, or is apt to be dishonest or untrustworthy in such an identification, or for some other reason would be likely to finger an innocent person such as Sprows alleges here, the trial court did not err in excluding the testimony under KRE 403. To simply assert to the jury that Farris had been diagnosed with paranoid schizophrenia, without additional expert testimony to explain to the jurors what that means and how it applies to this case, would

result in the probative value of the evidence being substantially outweighed by the danger of undue prejudice or confusion of the issues. KRE 403.

In any event, as similarly discussed above, whether treated as a constitutional level error or a non-constitutional error, the evidence is overwhelming that after Farris called the police on Sprows and effectively kicked him out of the apartment, Sprows retaliated by returning to the apartment and assaulting him. It follows that any error of the trial court in denying Sprows to cross-examine Farris on his alleged paranoid schizophrenia was harmless error. *Winstead v. Commonwealth*, 283 S.W.3d at 688–89.

IV. CONCLUSION

The judgment of the Jefferson Circuit Court is affirmed.

All sitting. All concur.

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