

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001802-MR

SAM DUFF

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00869

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

BUCKINGHAM, JUDGE: On June 21, 2001, Sam Duff shot and killed his wife. There were eyewitnesses to the shooting, and Duff's defense at trial was that he was guilty of manslaughter and not murder due to his mental state at the time. The jury convicted Duff of first-degree manslaughter, and he was sentenced to 19½ years in prison.¹ His direct appeal to this court followed.

Duff raises two issues in this appeal. The first issue involves whether the trial court erred by not delaying the

¹ The final judgment erroneously states that Duff is adjudged guilty of murder rather than first-degree manslaughter.

beginning of the third day of the trial for one hour, and the second issue involves whether the trial court erred in the latitude it allowed the Commonwealth in cross-examining Duff's expert witness. We conclude that the trial court did not err in either regard and thus affirm.

Because a domestic violence order was in effect against Duff at the time of the shooting, the Commonwealth sought the death penalty. From the beginning of the first day of the trial until 7:30 p.m. at the end of the second day of the trial, the court and counsel were involved in the jury selection process. Duff's counsel requested that the trial begin on the third day at 10:00 a.m. rather than at 9:00 a.m. Counsel stated to the court that he had a medical problem which required medication and that one of the side effects of the medication was insomnia.² He stated that the medication precluded him from getting a good night's sleep and made arising to begin the trial at 9:00 a.m. a difficult task for him. The Commonwealth did not object to beginning the trial one hour late, but the court nonetheless directed that the trial begin at 9:00 a.m.³

² Duff does not state in his brief what medical condition he had or what medication he was taking.

³ As a reason for not delaying the start of the trial until 10:00 a.m., the trial court noted that the jurors had already been released and told to return at 9:00 a.m.

Shortly before 9:00 a.m. on the following morning, Duff's counsel advised the court that he was not doing well and suggested that the trial be delayed until 1:00 p.m. The court denied the request and required that final jury selections be made. This process was completed sometime after 10:00 a.m. At that point, the court recessed until 1:30 p.m. at which time the trial continued with counsels' opening statements.

Duff argues "that he was denied full representation from his attorney because the court unfairly, for no justifiable reason, refused to accommodate his attorney's medical condition, leaving him 'there in body,' but obviously not at his best mentally."⁴ Duff argues that his attorney should not have been forced to make decisions concerning jury selection while in a fatigued state. In support of his argument, Duff cites Ferrer v. State, 718 So.2d 822 (Fla. Dist. Ct. App. 1998).

In Ferrer the trial court employed a procedure of "consolidated" jury selection whereby the jurors for three cases were selected one after the other from the same group of prospective jurors. The process began at 1:00 p.m. and continued throughout the afternoon and evening. By the time *voir dire* began in the third case, it was 7:30 p.m. The defendant's attorney objected to the beginning of jury selection

⁴ Duff also asserts that "[t]his trial shows the typical disregard of the welfare of the attorneys, and by extension, the defendants who have the most to lose, by many trial judges, especially in Fayette County."

at such a late hour, claiming that he was exhausted and could not render effective assistance any further that evening. The trial court denied his motion to continue the case, and the *voir dire* in the third case continued that evening until completion. Ultimately, the defendant was convicted of the crime for which he was charged.

The appellate court in Florida reversed the judgment of conviction and remanded the case for a new trial. 718 So. 2d at 826. After first noting the significance of the jury selection process, the court held that "the procedures used by this trial judge unreasonably inhibited the ability of counsel to engage in meaningful *voir dire* examination of prospective jurors." Id. at 825. The court further held that it was "an abuse of discretion in beginning jury selection for this case at that time over the objection of the party, and the concerned party has shown some prejudice." Id.

The Ferrer case is somewhat distinguishable from the facts of this case. In Ferrer the trial court required the attorney to continue working past 7:30 in the evening. In the case *sub judice*, the trial court merely required that counsel return the following morning at 9:00 a.m. rather than the requested time of 10:00 a.m. In other words, this case is distinguishable because counsel herein was given the opportunity to get rest and sleep before beginning at a reasonable hour the

following morning. Furthermore, the Ferrer court noted that "[o]ur holding is therefore limited to the circumstances here present." Id.

In Kentucky a trial judge "is vested with a large discretion in the conduct of the trial of causes and an appellate court will not interpose to control the exercise of such discretion by a court of original jurisdiction, unless there has been an abuse or a most unwise exercise thereof." Transit Auth. of River City v. Montgomery, Ky., 836 S.W.2d 413, 416 (1992). Further, "the granting of a continuance is in the sound discretion of a trial judge, and unless from a review of the whole record it appears that the trial judge has abused that discretion, this court will not disturb the findings of the trial court." Williams v. Commonwealth, Ky., 644 S.W.2d 335, 336-37 (1982).

We are unpersuaded that the trial judge abused his discretion in failing to allow counsel to begin the third day's proceeding at 10:00 a.m. rather than at 9:00 a.m. Also, we note that after the final jury selections were made shortly after 10:00 a.m., the court adjourned until 1:30 p.m. While Duff argues that his counsel was not at his best in making decisions concerning the peremptory challenges to jurors, he has not adequately shown prejudice but has referred to only "the possible results."

Duff's second argument is that the trial court erred in allowing certain questions by the Commonwealth in its cross examination of Duff's expert witness. Dr. Doug Ruth, a psychiatrist who testified as an expert on behalf of Duff, had written in his report that Duff should have realized his intoxication put him at risk of endangering another person because of his past experience with alcohol. Although Duff does not state in his brief how Dr. Ruth responded to the question, he asserts that "the unspoken underlying basis for his opinion [in his report] creates a serious problem with the evidence in that it suggests that appellant has had many past experiences with alcohol **where someone has been injured.**" [Emphasis in original.] Duff argues that the conclusion in Dr. Ruth's report "has no relevance whatsoever" and prejudiced his defense because "the jury would have to realize that appellant had injured 'other people' before, since Dr. Ruth prefaced his conclusion on appellant's past experiences." Since the trial court had ruled that past episodes of violence were not admissible, Duff claims reversible error.

KRE⁵ 611(b) states that "[a] witness may be cross-examined on any matter relevant to any issue in the case." In controlling the scope and limits of cross examination, the trial court has broad discretion and "the exercise of that discretion

⁵ Kentucky Rules of Evidence.

does not constitute reversible error unless clear abuse can be shown. Wallace v. Leedhanachoke, Ky. App., 949 S.W.2d 624, 625 (1996).

Duff's defense was that he should not be found guilty of murder because of his mental state at the time of the shooting. The statement in Dr. Ruth's report relates to Duff's mental state, or what it should have been, at that time. We conclude that the cross examination of Dr. Ruth on this matter was relevant to Duff's defense. Thus, we see no abuse of discretion in overruling Duff's attorney's objection.

The judgment of the Fayette Circuit is affirmed.

ALL CONCUR.

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