

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002034-MR

MARLIN LEE MERRICK

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DANIEL J. VENTERS, JUDGE  
ACTION NO. 01-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Marlin Merrick appeals the final judgment and sentence entered by the Pulaski Circuit Court on September 9, 2002. The judgment, entered following a jury trial, adjudged him guilty of criminal attempt to commit manslaughter, first degree (two counts), burglary first degree, and assault fourth degree and imposed a ten-year sentence. We affirm.

On April 6, 2001, Merrick went to the residence where his ex-wife, Patricia Samples, was living after hearing a telephone message she had left on the answering machine of one

of his male friends (Jackie Bryant). The message implied that Samples was interested in having a romantic relationship with Bryant. Merrick testified that he became so upset that he blacked-out and does not remember the subsequent events that led to his arrest. However, testimony from several witnesses indicated that Merrick came to the home of Cleda Stout, where Samples was living, armed with a handgun. He shot the gun several times into the door in order to gain entry and once inside the home, threatened both Stout and Samples with the gun. In addition, he physically assaulted Samples by striking her head, hitting her head on the floor and pulling out her hair. He then left the home and waited outside by his car until the police arrived. The entire altercation inside the home was recorded when Samples made a 911 call to the police and left the telephone on.

At trial, Samples, Stout and the responding police officers (Officers Craig Whitaker and Robert Jones) testified and the 911 tape and the recorded message Samples left on Bryant's answering machine were played for the jury. The Commonwealth then rested. On behalf of Merrick, friends Kathy Smith, Jackie Bryant, Jane Massey, and Val Simone testified as did his brother, Bill Merrick. Merrick then took the stand to testify on his own behalf. He testified that he was a Vietnam veteran who suffered from post-traumatic stress disorder (PTSD)

and from periods of black-outs. He also testified that there was much stress in his life on the day of the incident and after hearing the recorded message, he blacked-out and could not remember any of the events that transpired at Stout's home.

Finally, Peter Schilling, a Ph.D. in psychology testified on Merrick's behalf. He testified that in his professional opinion, Merrick was not able to conform his conduct to the requirement of the law on April 6, 2001, the date of the offenses. Schilling opined that Merrick had an underlying mental illness that was activated by multiple stressors which created the behavior Merrick could not control. These stress factors which activated the PTSD included the death of his mother, the loss of his job, chronic back pain, financial stress caused by the recent divorce, the divorce itself, stress associated with his relationship with Samples' son, P.J., alleged telephone threats he had recently received, the fact that his brother was dying and the message Samples left on Bryant's answering machine. Schilling testified the message indicating his ex-wife wished to have a relationship with his good friend Bryant was the "straw that broke the camel's back" and precipitated the black-out and the ensuing actions of Merrick.

On rebuttal, the Commonwealth called Candace Walker, a staff psychiatrist at Kentucky Correctional Psychiatric Center

(KCPC). Based upon her evaluations and observations she testified that Merrick was competent to stand trial and criminally responsible for his actions on the night of the offenses. She attributed his behavior to a combination of the stress factors previously listed and his consumption of alcohol. Also on rebuttal, Grace Samples, Patricia's mother, testified and the Commonwealth introduced a book entitled The Vietnam Veteran's Memorial, The Vietnam Directory of Names to rebut Merrick's testimony of an event that occurred during his tour of duty in Vietnam.

That concluded the proof and following jury instructions the case was submitted to the jury. The jury found Merrick guilty of two counts of criminal attempt to commit manslaughter, first degree and recommended five years on each count, of burglary, first degree and recommended ten years, and of assault, fourth degree and recommended twelve months. The court followed the jury recommended sentences and ran them concurrent for a total of ten years' imprisonment. This appeal followed.

On appeal, Merrick raises three issues that he believes require his conviction to be reversed. First, he contends the trial court erred in disallowing the non-expert opinion testimony of Val Simone. Next, he claims Grace Samples' rebuttal testimony was improper because it resulted in

impeachment on a collateral matter. Lastly, Merrick argues that admission of the Vietnam documents also resulted in impeachment on a collateral matter and was thus improper rebuttal.

We shall first address the testimony of Val Simone. Simone had previously listened to the 911 tape and Merrick wanted Simone to give an opinion, based upon the tape, as to whether or not "[Merrick] was out of his mind at that time." "That time" being the night of the attack as recorded on the 911 tape. The court sustained the Commonwealth's objection to the question and Merrick put the following testimony in by avowal:

TESTIMONY BY AVOWAL

(VAL SIMONE)

RE-DIRECT EXAMINATION

Hon. Mark Stanziano [Merrick's Attorney]

Q-1           There was an objection and in order to make sure the information is on the record I have to ask you some questions specifically, okay?

A.            Sure.

Q-2           The question I was asking is whether or not you had an opinion based on your knowledge of Marlin, your friendship over thirty years and what you heard on that audio tape as to whether or not Marlin was out of his mind at that time.

A.            He was certainly not the Marlin that I have ever known. He was out of control.

Q-3           And you would base that based on  
              what we've already talked about?

A.            My intimate knowledge of Marlin.  
              I've been in many situations with  
              him where he's been under stress  
              and things have not been going  
              right in his life, and I have  
              never known him ever in thirty-one  
              years to ever go off like that.  
              Totally out of character.

THAT IS THE AVOWAL.

THE COURT

              Do you have any questions, Mr.  
Montgomery?

RE-CROSS EXAMINATION

Hon. Eddy Montgomery [Commonwealth Attorney]

Q-1           April 6, 2001 you wasn't [sic] in  
              Pulaski County, were you?

A.            No, sir, I was not.

Q-2           You didn't personally observe  
              Marlin Merrick that night, did  
              you?

A.            Did I observe him visually?

Q-3           Yes, sir.

A.            No, sir.

Q-4           And your knowledge of . . .

THE COURT

              Well, let me ask this.

              Any other way did you observe him?

A. Yes, over the telephone, I believe.

THE COURT

On April 6<sup>th</sup>?

HON. EDDY MONTGOMERY

On April 6<sup>th</sup>, the night this happened.

A. Oh, no, sir.

Q-5 Okay. You had no contact with him that day.

A. No, sir, I did not.

Q-6 Okay. So your knowledge that he was out of control was based solely on you listening to the tape, the 911 tape.

A. Yes.

THAT IS ALL.

Merrick contends Kentucky Rules of Evidence (KRE) 701 permits a non-expert witness to express an opinion which is rationally based on the perception of the witness and is helpful to a determination of a fact in issue. Citing Clifford v. Commonwealth,<sup>1</sup> Merrick argues that the trial court erred by not allowing Simone to testify that Merrick was "out of control" based upon the 911 tape recording. We disagree. In Clifford, the undercover police officer testified to an opinion based upon a drug transaction he heard as the event unfolded. The audio

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<sup>1</sup> 75 S.W.3d 371 (Ky. 1999).

tape of the transaction was inaudible and the officer gave a lay opinion that one of the individuals involved was a male black based upon the conversation he heard. The Clifford court held:

[Clifford] next asserts that Smith should not have been permitted to express his opinion that the fourth voice he heard sounded like that of a black male. A nonexpert witness may express an opinion which is rationally based on the perception of the witness and helpful to a determination of a fact in issue. KRE 701. A corollary to this rule is the concept known as the "collective facts rule," which permits a lay witness to resort to a conclusion or an opinion to describe an observed phenomenon where there exists no other feasible alternative by which to communicate that observation to the trier of fact. See R. Lawson, The Kentucky Evidence Law Handbook § 6.05, at 275-76 (3d ed. Michie 1993).<sup>2</sup>

The Clifford case also cites to Commonwealth v. Sego<sup>3</sup> for the proposition that lay witnesses have been permitted to testify as to the mental and emotional state of another. However, the cases cited above each indicate the offered opinion must be rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony and there is no other feasible alternative by which to communicate that observation to the trier of fact. In this case, the 911 tape recording was played to the jury. It was audible and clearly depicted the actual events as they unfolded. The jury

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<sup>2</sup> Id. at 374.

<sup>3</sup> 872 S.W.2d 441, 444 (Ky. 1994).



in this case was in the same position as was Simone in determining if Merrick was "out of his mind at that time." As such, Simone's opinion was not helpful to a clear understanding of the testimony nor was it based on actual observation. Lawson's handbook sets forth numerous cases in which opinion testimony has not been admitted because the witness lacked personal knowledge or had no better information than the jury had in reaching an opinion. Lawson cites to Illinois Cent. R. Co. v. Haynes<sup>4</sup> for the policy the Kentucky Supreme Court had in mind when it made the following statement about lay opinion testimony: "A witness who is no better qualified than the jury should not be permitted to testify."<sup>5</sup> Simone had no professional training and was no better qualified than the jury to give an opinion on this issue. And his opinion was not based upon personal observation and he possessed no additional or better information than the jury had concerning Simone's actions on the night of the incident. Therefore, the court did not err when it refused to allow Simone to give his lay opinion as to Merrick's mental state as presented by the 911 tape recording.

The next issue raised by Merrick is that Grace Samples' testimony was improper on rebuttal because it

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<sup>4</sup> 139 S.W. 754, 756 (Ky. 1911).

<sup>5</sup> R. Lawson, Kentucky Evidence Law Handbook, § 6.05[2] at 404-05 (4<sup>th</sup> Edition, Lexis Nexis 2003).

represented impeachment on a collateral matter. Merrick argues that Grace was improperly permitted to testify that Merrick was violent in his treatment of his stepson, P.J., and had yelled and cursed the boy one time for getting his jacket dirty. Grace also testified that Merrick called her shortly before the incident and sounded "really mad" when he told her Patricia was having an affair with Jackie Bryant. The transcript of Grace's testimony relevant to Merrick and P.J. is as follows:

Q-17            Did you ever have any occasion to see him dealing with P.J.?

A.              Yes.

Q-18            In your estimation how did he treat P.J.?

A.              He was violent.

Q-19            What do you mean? Explain to the jury.

A.              Well, do you want me to tell the story? It was over a leather jacket that P.J. had worn to church, and he had got bubble gum, you know, chewing gum, in the pocket, and Marlin went to wear it to town and he stuck his hand in there and he got the gum all over his hand, and he was really, really upset.

Q-20            Did he cuss or . . .

A.              Yes, he cussed.

Q-21            Did he yell at P.J.?

A.              Yes.

Q-22           Outside of that how do you think  
                 he treated P.J. that you saw?

A.             Well, fair.

Later, in her testimony, Grace recounted her telephone conversation with Merrick on the night of the assault. That portion of her testimony is set forth below:

Q-38           Now, on the night of April 6, 2001  
                 did you get a phone call that  
                 night?

A.             Yes, I did.

Q-39           About what time?

A.             Well, it was about 10:30 or a  
                 quarter till 11:00.

Q-40           And who called you?

A.             Marlin Merrick.

Q-41           And did he say anything about  
                 Patty when he called?

A.             Yes.

Q-42           What did he say?

A.             He said, "You're not going to  
                 believe what I just found out,"  
                 that Patty was having an affair  
                 with Jackie Bryant.

Q-43           And I don't want to know what else  
                 was said that night, but did you  
                 talk to him a little bit longer?

A.             No. I hung up.

Q-44           You didn't have a long  
                 conversation.

A. No.

Q-45 From what you heard of his voice could you tell if he was drinking?

A. Some.

Q-46 Did he sound drunk or just like he was drinking?

A. Like he was . . . No, he wasn't drunk. He just sounded like drinking a little and really angry.

Q-47 So he sounded angry to you?

A. Uh huh.

Q-48 So your conversation was a short conversation.

A. Yes.

Q-49 When you say he sounded angry, did he sound really, really mad or just mad or can you kind of . . .

A. Really mad.

Q-50 Really mad? And was he mad at Patty?

A. Yes.

Q-51 And you're saying that phone call was what time?

A. It was at 10:30 or a quarter till 11:00.

Merrick contends that these exchanges resulted in improper impeachment on collateral matters. The Commonwealth responds that Grace's testimony was proper rebuttal testimony in

response to Merrick's previous testimony. Merrick cites to Purcell v. Commonwealth<sup>6</sup> as a recent case addressing impeachment on collateral facts. In Purcell, the Kentucky Supreme Court stated the following:

Although there is no provision in the Kentucky Rules of Evidence prohibiting impeachment on collateral facts, we have continued to recognize that prohibition as a valid principle of evidence. Neal v. Commonwealth, Ky., 95 S.W.3d 843, 849 (2003); Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 858 (1997); Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 705 (1994), abrogated on other grounds by Commonwealth v. Barroso, Ky., 122 S.W.3d 554, 563-64 (2003). Professor Lawson suggests that the issue is more properly decided by applying the KRE 403 balancing test, *i.e.*, weighing the probative value of the impeachment against the prejudicial effect of that evidence and its possible confusion of issues. Lawson, supra note 14, § 4.05[3], at 276. It would be a rare occurrence, we think, when the prejudicial effect of evidence of "other bad acts" would not substantially outweigh the impeachment value of such evidence. (Footnote omitted).<sup>7</sup>

While Merrick emphasizes the last sentence and argues he was prejudiced by Grace's testimony, we disagree. First, we do not believe her testimony concerned other bad acts nor do we agree that the probative value of the testimony was substantially outweighed by its prejudicial effect. As can clearly be seen in the exchange relating to P.J., Grace spoke of only one incident

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<sup>6</sup> 149 S.W.3d 382 (Ky. 2004).

<sup>7</sup> Id. at 397-98.

in which Merrick treated P.J. in a "violence" manner.<sup>8</sup> And in concluding her testimony, Grace stated that overall Merrick treated P.J. fairly. As to the conversation concerning the telephone call, Grace stated that Merrick sounded like he had been drinking and was really angry. This was not new evidence. Several witnesses had testified that Merrick had consumed alcohol that evening and that he was upset about the telephone call Patricia had made. The best evidence of Merrick's state of mind and behavior on the night in question was the 911 tape which the jury had already heard. We believe Grace's testimony was not improper rebuttal in that it specifically addressed issues raised by Merrick in his direct testimony. We also believe that its probative value outweighed any prejudicial effect it may have had. And finally, even if it had been improperly admitted, which we do not believe, it was harmless error, at best.<sup>9</sup>

Merrick's last argument concerns the admission of documents relating to a Vietnam War casualty. During his testimony, Merrick told the jury that he suffered black-outs and post-traumatic stress syndrome as a result of an incident when he served in Vietnam. He alleged that he was responsible for

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<sup>8</sup> This assumes that a reasonable juror would consider a parent yelling or cursing at a teenage boy to be violent behavior.

<sup>9</sup> See RCr 9.24.

the deaths of several friends when he ordered them into a bunker that was then destroyed by enemy mortar fire. Merrick claimed this occurred on Christmas Eve, 1967, and that the only name he could remember was Dick Stamper. On rebuttal, the Commonwealth introduced, over Merrick's objection, a book entitled, The Vietnam Memorial, The Vietnam Veterans Directory of Names, published in 1982, to contradict Merrick's testimony. This book listed Richard G. Stamper as having died on November 29, 1967, and not on Christmas Eve. On appeal, Merrick argues this was improper impeachment of a collateral matter. We disagree. We believe the court properly admitted the book in that it directly rebutted the basis upon which Merrick claimed his black-outs and PTSD originated. We also believe as before that if any error occurred, it was harmless. The evidence of Merrick's actions on the night in question was overwhelming, including testimony of the two victims and the 911 tape recording. It is beyond credibility to believe the jurors would have based their verdict in this case on whether Mr. Stamper died in Vietnam on November 29, 1967, or Christmas Eve of that year. While we do not believe the court erred in this matter, if it did, it was clearly harmless error.

For the foregoing reasons, the final judgment and sentence entered in this case by the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

G. Scott Hayworth  
Henry E. Hughes  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General  
  
Susan Roncarti Lenz  
Assistant Attorney General  
Frankfort, Kentucky