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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000457-MR

SAMUEL C. EDWARDS — APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
INDICTMENT NO. 03-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Samuel Edwards[1] was convicted by an Adair Circuit Court jury of two counts of first-degree assault.[2] He was also convicted of second-degree wanton endangerment,[3] leaving the

[1] In this opinion, Samuel Edwards will be referred to as "Edwards"; and his brother, Patrick Edwards, will be referred to as "Patrick."

[2] Kentucky Revised Statutes (KRS) 508.010.

[3] KRS 508.070.

scene of an accident,[4] and operating a motor vehicle with a blood alcohol concentration of .08 or above or while under the influence of alcohol or other substance which impairs driving ability.[5] He was sentenced to a total of fifteen years' imprisonment and a $500.00 fine.

On appeal from that judgment, Edwards asserts that the trial court made the following errors: failing to grant directed verdicts on one count of first-degree assault and on the wanton endangerment charge; admitting the results of his blood alcohol test despite the Commonwealth's failure to establish the chain of custody and the forensic scientist's inadequate training; failing to strike for cause a juror who had come upon the scene shortly after the crime occurred; and deviating from the jury's recommendation of concurrent sentencing. Because we find each of these claims to be either unpreserved or without merit, we affirm.

On March 16, 2003, while driving a purple Nissan pickup truck, Edwards struck a motorcycle carrying Wesley Hutchinson and Leslie Smith. Witnesses said Hutchinson and Smith were knocked off the motorcycle with great force. Officer Justin Claywell, who was standing in a nearby parking lot, heard, but did not see, the collision. He then saw Smith and

[4] KRS 189.580.

[5] In the part of this opinion that follows, this charge will be referred to as driving under the influence (DUI). KRS 189A.010.

Hutchinson lying in the road and the purple truck attempting to turn around. He recognized the occupants of the truck as Edwards and Edwards's identical twin brother, Patrick.[6] Claywell, who was in uniform, shouted and gestured for the driver to stop. Instead of stopping, Edwards drove off rapidly through a parking lot.

Edwards was apprehended minutes later by Officer Mark Harris,[7] who heard the radio call to be on the lookout for the distinctive vehicle. Harris noticed that the driver of the truck, Edwards, smelled of alcohol. When Harris had Edwards step out of the vehicle, he observed that Edwards's balance was very poor and that he was staggering noticeably. He did not have Edwards perform any field sobriety tests because he did not think Edwards would be able to perform them safely; Edwards's balance was so impaired that he appeared to be on the verge of falling down. Harris arrested Edwards for driving under the influence.[8] Sergeant Bobby Sullivan arrived in time to assist

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[6] Claywell could not tell which twin was driving only that the driver was wearing glasses. When the truck was stopped by police minutes later, Edwards was driving. He was also wearing glasses but his brother was not. Edwards has not denied that he was the driver of the truck at the time of the accident.

[7] Approximately one month after this accident, Mark Harris was promoted to chief of police. To avoid confusion, this opinion refers to him throughout as Officer Harris, the rank he held at the time of the accident.

[8] Patrick, who also appeared impaired, was arrested for public intoxication.

Harris with the arrest. Sgt. Sullivan testified that he had made hundreds of DUI stops and that he, too, believed that Edwards was under the influence of alcohol because of his demeanor and lack of coordination.

Edwards consented to a blood alcohol test. Harris transported Edwards to Westlake Hospital in Columbia. Harris then watched a female employee of the hospital draw Harris's blood and fill the vials of a blood alcohol test kit. Harris prepared the kit to be mailed to the Kentucky State Police (KSP) forensic lab in Frankfort and actually mailed it himself.

The kit containing the blood sample was received, with tamper-evident tape intact, at the KSP forensic lab by Jennifer Kendall, a forensic scientist specialist. Kendall tested the blood sample and determined that Edwards had a blood alcohol level of 0.14. Additional facts will be supplied as needed.

DIRECTED VERDICT ON WANTON ENDANGERMENT CHARGE

Edwards asserts that he was entitled to a directed verdict on the wanton endangerment charge because there was insufficient evidence to support this charge. He preserved this issue at trial by twice moving for a directed verdict on this charge.

On a motion for directed verdict, "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a

reasonable doubt that the defendant is guilty, a directed verdict should not be given."[9] In rendering this decision, "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth."[10] On appellate review, the test of a directed verdict is whether, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty.[11] Only if this is true is the defendant entitled to a directed verdict of acquittal.[12]

As described above, despite Officer Claywell's efforts to get Edwards to stop, Edwards turned the truck around and left the scene of the accident rapidly through a parking lot. Claywell testified that in the process of turning the truck around, Edwards drove his pickup truck "within inches" of Hutchinson's head while Hutchinson was lying injured on the pavement. This near miss of Hutchinson was the basis of the wanton endangerment charge.

According to KRS 508.070(1), "[a] person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person." Edwards asserts that he

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[9] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

[10] *Id*.

[11] *Id*.

[12] *Id*.

could not help coming close to Hutchinson or someone else while turning around because the roadway was narrow and crowded with onlookers. But he also asserts that Hutchinson was never placed in substantial danger of physical injury. Notwithstanding these naked assertions, when the evidence is viewed in the light most favorable to the Commonwealth, it was not unreasonable for the jury to find that Edwards's coming within inches of striking the already injured Hutchinson in the head with a moving vehicle created a substantial risk of physical injury to him. We are unpersuaded by Edwards's argument that the trial court erred by submitting the wanton endangerment charge to the jury rather than directing a verdict.

DIRECTED VERDICT ON FIRST-DEGREE ASSAULT CHARGE

Edwards also asserts that the trial court erred by failing to grant a directed verdict on the count of first-degree assault based on Smith's injuries from the collision. Edwards asserts that he was entitled to a directed verdict on this count because the Commonwealth failed to establish that Smith incurred a "serious physical injury," an element of first-degree assault.[13] Serious physical injury is defined by KRS 500.080(15)

[13] KRS 508.010 states as follows:

(1) A person is guilty of assault in the first degree when:

as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.”

After the accident, Smith and Hutchinson were taken to Westlake Hospital in Columbia but were later transferred by helicopter to University Hospital in Louisville because they were believed to have potentially life-threatening injuries. Smith’s most severe injury was a broken jaw, which required surgery. She was hospitalized for four days.[14] Her jaw was wired shut for six weeks. She was restricted to a liquid diet for six weeks[15] and was unable to chew for a total of eight weeks. At the time of trial, over nine months after the

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(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

[14] Smith also suffered a number of abrasions and cuts. She had a cut to the bone in her chin, which required stitches. She has been left with some small facial scars. She also has been left with scars on her knees. Since the accident, her knees pain her on cold days or after long shifts at work. She testified that she might someday need knee replacement surgery as a consequence of the accident.

[15] In fact, for the first three weeks, Smith was further restricted to clear liquids because she had problems with nausea. If she had vomited with her jaw wired shut, the consequences could have been serious. On one occasion, she had to have a shot to stop her nausea.

accident, she still could not chew well on one side of her mouth, and it was painful to chew gum.

She broke several teeth in the accident, and one and a half teeth had to be removed during the surgery to wire her jaw. Repairing her broken and missing teeth is a gradual process, which was not yet complete at the time of trial. After all of her broken teeth are repaired and missing teeth are replaced, Smith anticipated oral surgery to remedy the displacement of her teeth due to the accident. The accident caused her previously-straight teeth to become crammed together. Since the accident, Smith suffers from headaches, tingling, and localized numbness in her head, none of which occurred before the accident.

Edwards asserts that Smith's injuries could not rise to the level of serious physical injury. However, Edwards ignores the precedent of Clift v. Commonwealth,[16] in which a panel of this Court held that a reasonable juror could find that the significant impairment of an 11-month-old's use of his arm for four weeks due to a broken humerus is either a "prolonged impairment of health" or a "prolonged loss or impairment of the function of [a] bodily organ" under KRS 500.080(15) and, thus, a "serious physical injury."[17] The infant in question had to wear

[16] 105 S.W.3d 467 (Ky.App. 2003).

[17] *Id*. at 470, 472.

a sling for four weeks, impairing his mobility.[18] He resumed normal activity after four to six weeks, but there was medical testimony presented that this type of injury to a child of his age generally requires 18 to 24 months to completely heal.[19] Nevertheless, at the time of trial, the child was free of pain or any permanent disfigurement due to the injury.[20]

We find Smith's injury and impairment to be at least as severe as that of the injured infant in Clift, if not more so. Smith's normal activities were restricted for an even longer period of time due to her broken jaw than the injured infant. And unlike that child, who appeared to fully heal, Smith continues to suffer headaches, jaw pain, tingling, localized numbness, and broken and missing teeth as a result of her injury. We note that these facts might be sufficient to establish that Smith suffered a "serious and prolonged disfigurement,"[21] which is another way to prove that she suffered a serious physical injury within the meaning of KRS 508.010. For all of these reasons, we find no error in the trial court's instructing the jury on this count of first-degree assault rather than granting a directed verdict on this charge.

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[18] *Id.* at 470.

[19] *Id*.

[20] *Id*.

[21] *See* KRS 500.080(15).

CHAIN OF CUSTODY

Edwards asserts that the trial court erred by admitting the results of his blood alcohol test over his objection that the chain of custody was deficient because there was some question about who drew the blood. He asserts that this unanswered question deems the evidence concerning the blood alcohol test results not sufficiently reliable; and, hence, its admission violated due process.[22]

At trial, Tonya Luttrell testified that she had been a lab technician at Westlake Hospital for four years and that her job duties including drawing and testing blood and other bodily fluids. About twice a year, she is asked to draw blood by the police. She initially stated that she had no memory of drawing Edwards's blood or being asked to draw blood at the request of Officer Harris on March 16, 2003. She then testified about the specific procedures which she follows every time that she draws a blood sample for the police.[23] When asked if she followed this

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[22] If Edwards's claim were true, it would undermine not only his DUI conviction but, also, his conviction for two counts of first-degree assault. This is because the element of wantonness in his assault convictions seems to have been based primarily on his driving while under the influence of alcohol. *See* KRS 508.010.

[23] We note that this is evidence of habit or custom. To the extent that it was offered to show that Luttrell acted in accordance with this procedure on a particular occasion—which appears to be why this evidence was offered—it is inadmissible. *See* Burchett v. Commonwealth, 98 S.W.3d 492, 494-499 (Ky. 2003); Thomas v. Greenview Hospital, Inc., 127 S.W.3d 663, 669-671 (Ky.App. 2004). However,

procedure in drawing Edwards's blood on March 16, 2003, she said, "I think so. Yes." However, this tentative, affirmative statement was later contradicted on cross examination:

> **Defense counsel:** You don't have any personal recollection of taking blood from Mr. Edwards and giving it to an officer, do you?
>
> **Luttrell:** I very vaguely remember. I mean, it's been a long time ago.
>
> **Defense counsel:** I'll remind you you're under oath. . . . [D]o you have a personal recollection of on that date, March the 16th, of . . . an officer bringing Mr. Edwards in and you drawing blood?
>
> **Luttrell:** Not really.

Luttrell explained that without referring to her documentation, which she did not have with her, she had no way of recalling whether she drew a particular person's blood or drew blood at the request of a particular officer. Edwards repeatedly objected to Luttrell's testimony on the ground that she had no personal knowledge. However, these objections were overruled.

Officer Harris testified that he witnessed Edwards's blood being drawn at Westlake Hospital; but he did not know the name of the female employee of the hospital, whom he described as a nurse, who took the blood. But he described how the woman drawing the blood collected the blood from Edwards and filled

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Edwards never objected to this habit testimony at trial and has not raised this issue on appeal.

the vials from the blood alcohol test kit. Harris then described how his name, Edwards's name, and the name of the woman who drew the blood were all placed on the sample, along with the date and time the sample was taken. Finally, he testified that he sealed the test kit with the sample inside with tamper-evident tape and mailed it to the KSP forensic lab at Frankfort. He stated that the blood sample was never out of his sight from the time he witnessed the blood being drawn from Edwards until he mailed the kit containing the blood sample to the KSP lab.

Jennifer Kendall, a forensic science specialist at the KSP lab, also testified about the blood sample. Kendall stated that she picked up the blood alcohol test kit from the mail when it arrived. The tamper-evident tape was intact, and the names of Edwards and Harris were on the sample. Kendall stated that the blood sample was in her custody from the time it arrived at the lab by mail until she tested the blood.

Kendall testified, without objection, that the results of the blood alcohol test showed that Edwards had a blood alcohol level of 0.14. Approximately a minute later, the Commonwealth moved to introduce into evidence Kendall's written report on the results of Edwards's blood alcohol test. Defense counsel objected on the ground that the chain of custody of the blood sample was not established because of the question

concerning who drew the blood. The trial court gave Edwards the opportunity to cross-examine Kendall on this specific issue.

Upon cross-examination, Kendall admitted that she did not draw the blood herself and had no personal knowledge of who did. She stated that she believed that the person who drew the blood signed the sample. She conceded, however, that she only knew what name was listed on the sample, not whether the named person actually drew the blood and/or signed the sample.[24] The trial court overruled Edwards's objection. After making this ruling, the trial court clarified that it deemed Edwards's objection as an objection limited to the introduction of the written report and not to Kendall's earlier testimony concerning the results of the blood alcohol test. Defense counsel responded to the trial judge's comment that her objection was, in effect, an objection to Kendall's testimony concerning the blood alcohol test results also. The trial court did not change its ruling. The written report was allowed into evidence.

The first matter to be addressed is whether Edwards preserved this issue with a timely objection. When Edwards objected to the admission of the report of the blood alcohol test, Kendall had already testified, without contemporaneous objection, as to the blood alcohol test results. We note that

[24] Kendall never revealed the name of the person listed on the kit as the person who allegedly drew Edwards's blood.

this identical fact pattern—an objection to the introduction of a report on a blood alcohol content test after unchallenged testimony was presented on the results of the blood alcohol test—occurred in Matthews v. Commonwealth.[25] In that case, the Kentucky Supreme Court alluded to the potential preservation problem by quoting a passage from the Appellant's reply brief in which he admitted that he may have "waited two questions too late to object to the introduction of the blood alcohol content" but blamed his delay on being duped into believing that the Commonwealth could lay a proper foundation for the testimony.[26] Although the Supreme Court, never expressly stated that the issue was sufficiently preserved, the opinion proceeds to analyze the merits of the appeal in Matthews.[27] Following this precedent, we will also address the merits in this case. Nevertheless, the better trial practice would have been for defense counsel to have interposed an objection, if she had one, before Kendall told the jury the results of the blood alcohol lab test rather than after.

It is well-established that a chain of custody is required for substances such as blood, which are not clearly identifiable or distinguishable, to show that the sample tested

[25] 44 S.W.3d 361, 363-364 (Ky. 2001).

[26] *Id*. at 364.

[27] *Id*. at 364-365.

was the same sample drawn from the person in question.[28] The chain of custody does not need to be perfect, eliminating any remote possibility of tampering or misidentification, however.[29] The chain of custody is sufficient "so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'"[30] Additionally, any gap in the chain of custody normally goes to the weight of the evidence rather than to its admissibility.[31]

In Matthews v. Commonwealth, the Commonwealth was unable to locate for trial the hospital employee who drew blood for a blood alcohol test from a defendant suspected of driving under the influence.[32] But the veteran police officer, who had requested that the blood be drawn, witnessed the entire process.[33] He saw the hospital employee, whom he believed to be a registered nurse named Susan, clean the defendant's arm and

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[28] Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998); Robert Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 11.00[3], pp. 843-846 (4th ed. Matthew Bender 2003); Henderson v. Commonwealth, 507 S.W.2d 454, 461 (Ky. 1974); Calvert v. Commonwealth, 708 S.W.2d 121, 124 (Ky.App. 1986).

[29] Rabovsky, *supra* at 8; Brown v. Commonwealth, 449 S.W.2d 738, 740 (Ky. 1969).

[30] Rabovsky, *supra* at 8 (quoting United States v. Cardenas, 864 F.2d 1528, 1532 (10th Cir. 1989)).

[31] Rabovsky, *supra* at 8 (citing United States v. Lott, 854 F.2d 244, 250 (7th Cir. 1988)).

[32] *Supra* at 363.

[33] *Id*.

draw his blood, filling two vials of blood for the blood alcohol test kit.[34] The police officer stated that he was familiar with the prescribed procedures for drawing blood for a blood alcohol test and that Susan followed these procedures.[35] While he could not remember Susan's surname at trial, he knew that he noted it, as well as the time the blood was drawn, on the blood kit at the time the sample was drawn.

The defendant in Matthews objected to the admission of the report of his blood alcohol test results prepared by a chemist at the KSP forensic lab because of the lack of proper foundation, specifically the credentials of the person who drew the blood.[36]

The defendant in Matthews argued that KRS 189A.103(6), which authorizes blood to be drawn by a physician, registered nurse, phlebotomist, medical technician, or medical technologist, means that these are the only persons qualified to draw blood for a blood alcohol test and that the failure of the Commonwealth to prove that blood was drawn by one of these individuals renders evidence concerning the blood sample inadmissible.[37] But the court stated the effect of the statute

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[34] *Id.*

[35] *Id*.

[36] *Id*. at 363-364.

[37] *Id.*

and regulations was to create a "presumption of regularity" when blood is drawn by a person authorized by the statute and regulations.[38] This is based on the presumption that these named individuals will perform the procedures involved in drawing blood correctly because of their skill and training.[39] However, the Court noted that persons other than those authorized to draw blood by the statute and regulations may be able to draw blood properly.[40] Based on the testimony presented by the veteran police officer who was familiar with the procedures required to draw blood for a blood alcohol test, the Court concluded that "the proper procedures were followed."[41] The Court also stated as follows:

> Moreover, to reject this evidence in the absence of any indication whatsoever of contamination or inaccuracy would place form over substance. . . . While a proper foundation may not have been laid, and the Commonwealth may have been remiss in failing to prove that a registered nurse drew the blood, the record contains sufficient admissible evidence to sustain the conviction.[42]

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[38] *Id*. at 364.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

In the instant case, Edwards does not base his challenge to the admissibility of the blood test evidence on the allegation that the Commonwealth did not prove that whoever drew his blood was authorized to do so under KRS 189A.103(6). Instead, he asserts that the Commonwealth's failure to present evidence by someone who remembers drawing the blood compromised the chain of custody. Edwards argues that the facts in the instant case are like those in Henderson v. Commonwealth or Rabovsky v. Commonwealth, in which Kentucky's highest court held that evidence concerning blood samples should not have been introduced into evidence because of deficiencies in the chain of custody.[43] But these cases are distinguishable from the instant case. In Henderson, there was no evidence concerning the integrity of the blood sample from the time it was released at the scene by the investigating officers to another police officer until it reached the laboratory analyst.[44] This gap created the very real possibility that the sample could have been tampered with or misidentified during that time period. In Rabovsky, the chain of custody did not merely have a gap in it, it was nonexistent. No evidence was introduced to prove who

[43] *But see* Henderson, *supra* at 461 (holding that the admission of the blood samples and comparisons was harmless because they only proved that blood on the weapon, found near the victim's body, was the victim's type and that there was blood on the defendant's socks and towels, which he admitted), Rabovsky, *supra* at 8-9.

[44] *Supra* at 461.

collected the blood samples, how they were stored, how they were transported to one private laboratory, how (or if) they were transported to a second private laboratory, or what method was used to test the samples.[45]

The instant case does not pose such a problem. The whereabouts of the blood sample are fully accounted for from the time it was drawn until it was tested. And, as in Matthews, sufficient evidence is provided that the blood was properly drawn based on the testimony of an experienced police officer who observed the procedure.[46] Moreover, Edwards does not assert that the blood sample was actually misidentified, tampered with, or improperly drawn.

While the Commonwealth may not have laid the perfect chain of custody due to an unprepared witness, Luttrell, it did present sufficient evidence to show that the blood sample tested was the sample drawn from Edwards and that it had not been tampered with. This is enough to support the admissibility of the blood alcohol evidence and sustain the conviction. And, as the Supreme Court noted in Matthews, "to reject this evidence in the absence of any indication whatsoever of contamination or

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[45] Rabovsky, *supra*, at 7-8.

[46] Officer Harris testified at trial that he had fifteen years of experience as a police officer.

inaccuracy would place form over substance."[47] We find no error in the admission of the testimony and report concerning Edwards's blood alcohol level.

CALIBRATION OF BLOOD ALCOHOL TESTING EQUIPMENT

Edwards also asserts that the trial court improperly admitted the testimony and report concerning the blood alcohol test results because the results were not sufficiently reliable. Kendall, the forensic scientist specialist at the Kentucky State Police lab who performed the test testified that she has a bachelor's degree in chemistry and has received in-house training by the KSP, including training on how to operate the device which tests blood alcohol levels. She stated that she calibrated the machine before performing the first blood alcohol test on the day that she tested Edwards's sample and that she performed controls throughout the day as she tested blood alcohol samples to verify that the machine was still performing accurately.

Edwards asserts that the test results are unreliable because Kendall had received no specialized training on calibration from the manufacturer of the device which tests blood alcohol. Edwards never raised this issue at trial. He sought to suppress the test results only on the ground of

[47] *Supra* at 364.

alleged defect in the chain of custody concerning who drew the blood. Therefore, this issue was not preserved for review.

Even if the issue were preserved, we would find no merit in Edwards's claim. Edwards never asserts that training by the manufacturer of the equipment is even available. If such training were available, he does not state how or if it is superior to the in-house training offered by KSP. In fact, he does not allege any actual deficiency in the training in calibration which Kendall received. Nor does he allege that the blood alcohol test results were actually erroneous due to a calibration error. Thus, this claim is both unpreserved and without merit.

FAILURE TO STRIKE JUROR FOR CAUSE

Edwards asserts that the trial court abused its discretion in refusing to strike Juror #125 for cause because he happened to arrive at the scene of the accident shortly after it occurred when some police officers and bystanders were still standing about talking. According to the trial record, Edwards waived this issue at trial.

Edwards asserts that he preserved this issue by requesting that Juror #125 be struck for cause, but this statement is misleading and not totally accurate. The fact that Juror #125 had come upon the scene of the accident first came to

light during the Commonwealth's voir dire. Although he had not seen the accident or talked to anyone at the scene about it, Juror #125 still expressed some concern about whether he could totally put what he saw out of his mind and judge the case based solely on the evidence.[48] Defense counsel moved to strike Juror #125 for cause. The trial court denied this motion as premature at that point but stated that defense counsel could question Juror #125 further during defense voir dire.

During defense voir dire, defense counsel did question Juror #125 further. Juror #125 continued to express some uncertainty about whether his having stopped at the scene might affect him as juror. The trial court then questioned Juror #125, eliciting the responses that nothing Juror #125 had observed or heard that day had made him form an opinion as to the guilt or innocence of Edwards and that he still had no opinion as to the guilt or innocence of Edwards. The trial court then informed defense counsel that she was free to question Juror #125 further or to approach the bench for a bench conference giving the defense the opportunity to renew the motion to strike Juror #125 for cause if Edwards still wished to do so. Instead, the defense simply dropped the issue.

[48] It is unclear from the record exactly what Juror #125 did see or hear at the accident scene. He was never asked to describe what he saw or heard that day.

Under these circumstances, we deem Edwards to have waived this issue by failing to renew his motion to strike for cause at the appropriate time. We must presume from the trial record that Edwards was satisfied by the answers he received during the additional voir dire. Therefore, this issue is not preserved for appellate review.

DEVIATING FROM JURY RECOMMENDATION ON SENTENCING

Edwards asserts that it was an abuse of discretion for the trial court to deviate from the jury's recommendation of concurrent sentencing. The jury recommended that Edwards's two, ten year sentences for first-degree assault be served concurrently. But the trial court overlapped the terms so that they are partially concurrent and partially consecutive, for a total of fifteen years' imprisonment. In making this sentencing decision, the trial court reviewed the victim impact statements and PSI report. The PSI report revealed that Edwards had been an alcoholic for twenty of his thirty-nine years and continued to abuse alcohol, morphine, marijuana, and heroin, despite having tried various substance abuse treatment programs. Observing that the jury had been specifically informed that its decision regarding concurrent and consecutive sentencing was only a recommendation, the trial court chose to deviate from the jury's recommendation for fully concurrent sentencing. The

reasons given by the trial court for increasing Edwards's sentence to be served from ten to fifteen years were the fact that Edwards had been unable to resolve his substance abuse problem in twenty years and the fact that he had come "extremely close" to killing Hutchinson and Smith as a result. Based on these facts, the court deemed it appropriate that Edwards "be removed from society for a considerable period of time."

It is well established that the trial court is not obligated to accept the recommendation of the jury on concurrent sentencing.[49] Upon review, the question is whether the trial court abused its discretion in rendering a decision which is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[50] In the instant case, the trial court provided several reasons for declining to follow the jury's recommendation to run both of the ten-year sentences concurrently. Under these circumstances, we find no abuse of discretion in the trial court's sentencing.

Having concluded that each of the points of appeal which Edwards has raised is either unpreserved or without merit, we affirm.

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[49] *See* Murphy v. Commonwealth, 50 S.W.3d 173, 178 (Ky. 2001); Swain v. Commonwealth, 887 S.W.2d 346, 348-349 (Ky. 1994); Nichols v. Commonwealth, 839 S.W.2d 263, 265 (Ky. 1992); Dotson v. Commonwealth, 740 S.W.2d 930, 932 (Ky. 1987).

[50] *See* Murphy, *supra* at 178; Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

ALL CONCUR.

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