

RENDERED: AUGUST 18, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002282-MR

VERTIS RAY BISHOP

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND ABRAMSON, JUDGES; EMBERTON,¹ SENIOR JUDGE.

BARBER, JUDGE: Appellant, Vertis Ray Bishop (Bishop), appeals his conviction for manslaughter in the second degree. We affirm the trial court's judgment.

Bishop's son, Dwayne, was involved in a verbal altercation with Ray Lester and Anthony Kinder. Dwayne arrived at his father's home with Lester driving behind him, and asked Bishop to "keep them off him." When Bishop came out of his

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section (110)(5)(b) of the Kentucky Constitution and KRS 21.580.

house, he saw Lester standing near Dwayne, looking as though he might hit him. Bishop took a revolver and ordered Lester off his property. Bishop stated that he cocked the gun, intending to fire a shot into the air to scare Lester. Bishop testified that as he approached Lester he slipped and fell. The gun discharged, shooting Lester between the eyes and killing him. Bishop informed the investigating officers that there had been an accident and that he had shot Lester. Dwayne Bishop and a witness at the scene testified that Bishop appeared to stumble and fall into Lester when the shot was fired. The Commonwealth charged Bishop with intentional murder. Bishop was convicted of second degree manslaughter.

Bishop contends that the trial court committed reversible error by introducing "gruesome" photographs of the decedent, including one showing a metal rod passing through Lester's body to illustrate the path of the bullet. The photographs showed the decedent, a substantial amount of blood, and blood spatters at the scene. Bishop asserts that the cumulative nature of the photographs was overwhelming and improper. Bishop made a pre-trial motion in limine to exclude the photographs. Bishop objected to the introduction of the photographs at trial as well. The Commonwealth argues that Bishop agreed that the majority of the photographs were relevant. Bishop asserts that the photographs were prejudicial,

and biased the jury. Bishop cites the maximum sentence for manslaughter he was given. The Commonwealth contends that none of the photographs were so gruesome as to be prejudicial, showing that the jury's verdict of guilty of manslaughter was far less than the murder charge that Bishop originally faced.

The Kentucky Supreme Court has held:

While photographs of a victim's corpse may often be gruesome, they are also generally admissible if relevant. Parker v. Commonwealth, 952 S.W.2d 209, 212-13 (Ky.1997); Whitaker v. Commonwealth, 895 S.W.2d 953, 954 (Ky.1995). See also Carson v. Commonwealth, 382 S.W.2d 85, 90 (Ky.1964) ("Even though the admission of a photograph may arouse passion, or bring to mind vividly the details of a shocking crime, if the picture serves to illustrate a material fact or condition, it is considered admissible."). The same rule applies with regard to videotapes of a victim's corpse. Mills v. Commonwealth, 996 S.W.2d 473, 489 (Ky.1999). Because the Commonwealth must prove the corpus delicti, such photographs are relevant to show the nature of the injuries inflicted by the defendant upon the victim. Adkins v. Commonwealth, 96 S.W.3d 779, 794 (Ky.2003).

However, such evidence can be excluded even though relevant if its probative value is substantially outweighed by the danger of undue prejudice. We review a trial court's weighing of these factors for abuse of discretion. Johnson v. Commonwealth, 105 S.W.3d 430, 438 (Ky.2003); City of Louisville v. Yeager, 489 S.W.2d 819, 821 (Ky.1973). The balance tilts toward inadmissibility of a depiction of the victim's corpse where "the condition of the body has been materially altered by mutilation, autopsy, decomposition, or other extraneous causes, not related to the commission of the crime, so that the pictures tend to arouse passion and appall

the viewer." Clark v. Commonwealth, 833 S.W.2d 793, 794 (Ky.1991).

Ernst v. Commonwealth, 160 S.W.3d 744, 757 (Ky. 2005).

The parties admit that the photographs are an accurate portrayal of the scene. Aside from the photograph showing the trajectory of the bullet, the photographs show the decedent as the EMT's found him. Photographs which are an accurate portrayal of the scene may properly be found admissible.

Johnson v. Commonwealth, 103 S.W.3d 687, 696 (Ky. 2003). Even where a photograph is arguably gruesome, where it shows the impact of the defendant's actions, it may be admitted. Page v. Commonwealth, 149 S.W.3d 416, 420 (Ky. 2004). The Commonwealth argued at trial that the decedent did not leave the side of his car and was not acting in a threatening manner. The trial court held that the photographs were relevant to show where the victim was when he was shot, and were not improperly prejudicial. We affirm the trial court's ruling.

Defense counsel asked that the jury be permitted to go to the Bishop home to better understand the circumstances surrounding the shooting. The Commonwealth argued against the trip. The Commonwealth claimed that the land looked substantially different at the time of the late summer trial than it had in January when the shooting occurred. The Commonwealth also argued that the yard was flat, and that there

was nothing to cause Bishop to trip. Bishop claims that as the Commonwealth contended that the jury needed to see the "lay of the land," when justifying the admission of the photographs, the jury would be helped by seeing the land in a personal visit to the scene.

The trial court denied the motion, ruling that a visit to the crime scene would not benefit the jury. KRS 29A.310(3) permits a jury to visit a crime scene at the trial court's discretion. See also: Clark v. Fawcett, 450 S.W.2d 528 (Ky. 1970). Reversal of such a discretionary ruling requires a showing that the court's ruling was arbitrary, unreasonable, or legally unsound. Daniel v. Commonwealth, 905 S.W.2d 76, 78 (Ky. 1995). Bishop has failed to make such a showing here. It is common knowledge that a party can trip, whether or not there is an obstacle, and that a person can feel threatened, whether or not an actual threat exists. The testimony of all witnesses was similar, and provided the jury with an accurate picture of the alleged offense. There has been no proof that the jury needed to visit the actual scene to understand what happened. We affirm the trial court's denial of the motion.

Bishop argues that the Commonwealth improperly introduced victim impact evidence during the cross-examination of Bishop's wife. The prosecutor asked Bishop's wife whether she had been able to see her husband while he was free on bond

after the shooting. The prosecutor then asked her when and how Lester's wife got to see him, eliciting the testimony that Lester's wife had to go to the graveyard to visit her husband. Lester's wife gave essentially the same testimony at sentencing. Bishop claims that it was improper for the prosecutor to ask these leading questions. He contends that evidence intended to arouse sympathy for the decedent's family is inappropriate during the guilt phase of a trial. Ernst v. Commonwealth, 160 S.W.3d 744, 763 (Ky. 2005), citing Bennett v. Commonwealth, 978 S.W.2d 322, 325-26 (Ky. 1998).

It is not error to introduce evidence showing that the decedent was a family man. Rogers v. Commonwealth, 60 S.W.3d 555, 559 (Ky. 2001). The courts have found it immaterial, but not prejudicial error, to ask a widow questions about the last time she saw her husband, or about how many children the decedent has. Nickell v. Commonwealth, 565 S.W.2d 145, 147 (Ky. 1978). This type of question may be found prejudicial where it inflames the jury. Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984). In this case, Bishop was charged with murder, but the jury convicted him of manslaughter. The Commonwealth alleges that this shows that the jury's passions were not inflamed. We find that the questions asked by the prosecutor do not range so far outside the acceptable norm as to constitute reversible error.

Bishop argues that it was error for Lester's wife to sit behind the prosecutor, crying, during the majority of the trial. No objection was made to the presence of the witness during the trial. The law provides that a judge has the right and duty to control his courtroom in a manner he sees fit. Wilson v. Commonwealth, 836 S.W.2d 872, 884-885 (Ky. 1992). Mere crying by family members during the guilt phase of a trial has been held not to be "the sort of emotional outburst that would inflame the jury's passion" and does not give rise to reversible error. Lanham v. Commonwealth, 171 S.W.3d 14, 15 (Ky. 2005). Bishop has failed to show reversible error in the conduct of the trial. For this reason, we affirm the conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

Euva D. May
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky