

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000563-MR

CHRISTY BROCKETT

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 04-CR-00233

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Appellant, Christy Brockett, was convicted of second-degree manslaughter following a jury trial in Boyd Circuit Court. She received a sentence of five years' imprisonment. On appeal, Brockett argues: (1) that the trial court erred by refusing to read the KRS 189A.010(3)(a) presumption regarding intoxication levels to the jury; and (2) that the trial court erred by allowing a witness for the Commonwealth to testify in rebuttal rather than during its case-in-chief. We affirm.

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Brockett was employed as a waitress at the Texas Roadhouse restaurant in Ashland, Kentucky. On June 3, 2004, Brockett arrived at the restaurant to work her afternoon shift, but exchanged shifts with a co-worker who needed extra hours. Brockett remained at the restaurant for lunch and drinks with a friend. Over the course of approximately three hours, Brockett consumed three and a half beers along with her food. Later that afternoon, Brockett received a call from her boyfriend who informed her that he could not pick up her daughter from preschool. Brockett then left the restaurant and stopped at a drugstore where she purchased a six-pack of beer and a fifth of bourbon. Brockett was observed driving at a high rate of speed on the way to the preschool. Brockett struck a motorcycle driven by Edward Lewis. When the police arrived at the scene, Lewis was lying beside the road with severe head injuries. The responding officers detected the odor of alcohol on Brockett's person, but could not determine if it emanated from her breath or from her clothes. The officers also located two full beer cans inside Brockett's vehicle as well as two more full cans in a nearby creek. The receipt from the drugstore was also found indicating that Brockett had made her purchases eleven minutes prior to the crash. The bourbon and other beer cans were not recovered. Brockett failed a field sobriety test and consented to a blood test at a local hospital. Her blood-alcohol content was .08. Lewis died later that evening as a result of the injuries he sustained in the crash. Brockett was indicted for wanton murder. Following a jury trial, she was found guilty of second-degree manslaughter and received a sentence of five years' imprisonment. This appeal follows.

Brockett first argues that the trial court erred by refusing to read the KRS 189A.010(3) (a) presumption regarding intoxication levels to the jury. The Kentucky Supreme Court has held that the KRS 189A.010(3) presumptions are inapplicable to any criminal offenses except for driving under the influence (DUI). *Walden v. Commonwealth*, 805 S.W.2d 102, 104 (Ky. 1991)(overruled on other grounds by *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996)); *Overstreet v. Commonwealth*, 522 S.W.2d 178 (Ky. 1975). Indeed, it has been held as error to read the presumptions to the jury in a prosecution for an offense other than DUI. *Id.* We are cited to no authority to the contrary. The sole charge on the indictment in this case was wanton murder. Therefore, it was not error for the trial court to refuse to read the presumptions to the jury.

Next, Brockett argues that the trial court erred by permitting the Commonwealth's expert witness, Dr. William Ralston, to testify in rebuttal rather than during its case-in-chief. RCr 9.42(e) states: "The parties respectively may offer rebutting evidence, unless the court, for good reason in the furtherance of justice, permits them to offer evidence-in-chief." The admission of evidence in rebuttal is committed to the discretion of the trial court. *Gilbert v. Commonwealth*, 633 S.W.2d 69, 70 (Ky. 1982). However, this discretion is not unlimited. *Id.* "The Commonwealth should not be permitted to take undue advantage of the defendant and withhold important evidence until near the close of trial, and then introduce it in the guise of rebuttal evidence." *Id.* at 71. *Gilbert* dealt with the admission of the defendant's confession to police during

rebuttal purportedly to contradict the defendant's prior testimony. In the present case, our review of the record indicates that Dr. Ralston's testimony specifically referred to and was used to rebut Dr. O'Connell's opinion that Brockett's blood-alcohol content was not above the legal limit and that she was not under the influence of alcohol at the time of the crash. Also, contrary to Brockett's assertion, Dr. Ralston's opinion that her blood-alcohol content was above the legal limit did not constitute substantive proof of an element of her offense. The Commonwealth was only required to prove that Brockett acted wantonly or recklessly, not that her blood-alcohol content was above .08. Further, the Commonwealth did not withhold any evidence nor was there any surprise to the defense. The trial court did not abuse its discretion.

Accordingly, the judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

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