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(FILE NO. 2008-SC-0642-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000576-MR

MARC NICELEY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 05-CR-00556

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

VANMETER, JUDGE: Marc Niceley appeals from the Kenton Circuit Court's judgment sentencing him to fourteen years' imprisonment after a jury found him guilty of criminal attempt to commit murder. We affirm.

I. General Facts

On June 16, 2005, at 8:50 a.m., Niceley reported to Kenton County 911 emergency services that his wife, Jody Niceley (now Schneider),[2] had been shot but was still breathing. Officers reported to the scene and found Schneider unclothed, lying on her back, and covered in blood. She had a circular gunshot wound on the top, back-left portion of her head. Appellant's loaded .22 caliber semi-automatic pistol lay on a nearby dresser.

Schneider underwent emergency surgery at the University Hospital in Cincinnati, where doctors removed the top of her skull to alleviate pressure from her swelling brain and removed a portion of her brain. Schneider survived her injuries but has no memory of the time period from the night before she was shot until several weeks later.

Detectives found no signs of forced entry into the couple's home; nor was there evidence that anything was stolen, evidence of a struggle, or evidence that anyone other than Niceley or Schneider had been in the house. Niceley was indicted for criminal attempt to commit murder in October 2005. He maintained that he discovered Schneider's injuries after returning from an early morning trip

[2] According to Niceley's brief, he and Jody were divorced after the jury issued a verdict convicting him in this matter. For clarity, we will refer to Jody in this opinion as Schneider, although her name was Jody Niceley during the events leading up to Niceley's conviction.

to a local store for cigarettes. Indeed, Niceley was filmed by a store's video surveillance footage buying cigarettes at 8:42 a.m. Nevertheless, after a month-long trial, a jury found him guilty of criminal attempt to commit murder and recommended a fourteen-year sentence. The trial court sentenced Niceley accordingly. This appeal followed.

II. Hearing Regarding Schneider's Competency to Testify

KRE[3] 601(a) provides that "[e]very person is competent to be a witness except as otherwise provided in these rules or by statute." Here, Niceley moved the court to hold a competency hearing to determine whether Schneider should be disqualified from testifying, arguing that she lacked the capacity to recollect facts pursuant to KRE 601(b)(2). After a competency hearing in which the trial judge questioned Schneider, the court found that she was competent to testify. The court further declined to find that Schneider was incompetent to testify about the events of June 16, 2005.[4] The court denied Niceley's motion to reconsider, noting that it would "rule on any objections to questions posed to this witness when they are made" at trial.

Niceley argues that the trial court denied his right to a full and fair hearing when, at the competency hearing, the judge questioned Schneider, denied Niceley the opportunity to cross-examine her, and further declined to consider

[3] Kentucky Rules of Evidence.

[4] The court reasoned that much could happen before the trial began. For example, the judge once had heard testimony from a witness whose memory had been jogged by hypnosis.

medical testimony regarding Schneider's capacity to remember the events. We disagree.

Again, KRE 601(a) creates a presumption that a witness is competent to testify. A trial court has the sound discretion to determine whether a particular witness is competent to testify. *Pendleton v. Commonwealth*, 685 S.W.2d 549, 551 (Ky. 1985). In *Muncie v. Commonwealth*, 213 S.W.2d 1019, 1020 (Ky. 1948), the court reviewed a trial court's determination that a young girl was competent to testify against a man who was eventually convicted of attempting to rape her. Affirming the trial court's determination of competency based upon the commonwealth attorney's examination of the young girl, the court explained:

> The general rule, which prevails in this jurisdiction, is that the question of the competency of a child of tender years to testify is to be determined by the court after a careful examination of the child as to age, capacity and moral accountability. But this does not mean that the trial judge must himself interrogate the child, although such is the customary and better practice. In the Whitehead case, 105 S.W.2d on page 837, we quoted from 28 R.C.L. p. 465, § 52 to the effect that when a young child is offered as a witness, "the trial judge, without the interference of counsel further than he may choose or allow," should examine the infant to see if he or she can qualify as a witness.

Id. at 1021 (internal citations omitted). The court further reiterated language from an earlier case that "no definite procedural strait-jacket can be outlined for the examination into the aptitude, capacity of understanding, or intelligence of the witness." *Id.*

Since no definite procedure exists for examining a witness's competency to testify, Kentucky's appellate courts have affirmed competency determinations based upon varying examinations. *See, e.g.*, *Bart v. Commonwealth*, 951 S.W.2d 576, 579 (Ky. 1997) (trial court heard the direct and cross-examination of both the witness and her therapist); *Wombles v. Commonwealth*, 831 S.W.2d 172, 174 (Ky. 1992) (trial court conducted in-chambers interview of witness). Here, after accepting proposed questions from the Commonwealth and defense counsel, the trial judge personally examined the witness but declined to hear medical testimony. We cannot say that the trial court erred by employing this procedure. While Niceley cites to case law emphasizing a criminal defendant's right to confront and cross-examine witnesses in general, he does not cite any authority which requires a trial court to permit a criminal defendant to cross-examine a witness during a competency hearing. We note that Niceley exercised his right to cross-examine Schneider at trial.

Further, insofar as Niceley argues that the trial court erred by finding Schneider to be a competent witness, the trial court did not abuse its discretion, *Jarvis v. Commonwealth*, 960 S.W.2d 466, 468 (Ky. 1998). Schneider was fully capable of answering the trial court's biographical questions. While she became visibly confused when asked about the days surrounding the date of the shooting, Schneider was clearly competent to testify that she did not recall the events. Although the trial court reserved for trial its rulings on any objections to specific

questions posed to Schneider, Niceley does not challenge any such rulings on appeal.

III. Issue of Schneider's Competency at Trial

Niceley procured the testimony of neuropsychiatrist Dr. Robert Granacher regarding Schneider's brain damage and ability to recollect facts. Although the trial court did not consider Dr. Granacher's testimony in determining Schneider's competency to testify,[5] it permitted Dr. Granacher to testify at trial. However, the trial court limited the scope of Dr. Granacher's testimony. During a break in the trial, the trial judge indicated that during Dr. Granacher's testimony, Schneider's competency as a witness should not be "rehashed." The trial judge clarified this point, stating that while Dr. Granacher could testify regarding Schneider's physical and neurological deficits, he could not opine whether she was "competent" to testify, or as to the "veracity," "credibility," or "reliability" of her testimony. Simply put, Dr. Granacher could not "connect the last two dots." Niceley argues that by limiting the scope of Dr. Granacher's trial testimony, the trial court denied his right to impeach Schneider's credibility with regard to her testimony about the events surrounding her injury.[6] We disagree.

[5] At the competency hearing, after the trial court orally concluded that Schneider was competent to testify, based upon Schneider's testimony, it permitted Niceley to elicit Dr. Granacher's testimony for the record.

[6] Niceley couches his argument at times in terms of his challenging Schneider's competency to testify. We note that "[c]ompetency is an ongoing determination for a trial court." *B.B. v. Commonwealth*, 226 S.W.3d 47, 49 (Ky. 2007) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 740, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)). "An appellate court may consider a trial court's competency determination from a review of the entire record, including the evidence subsequently introduced at trial." *Id.* However, Niceley has not indicated that he renewed his motion to declare Schneider incompetent to testify after the trial court found that she was competent to testify. Further, we are unaware of any new facts after the competency hearing

Schneider testified at trial that while she had no memory of the day she was injured, she knew herself and what she was capable of, and she knew that she did not shoot herself. As such, she offered limited testimony regarding the events surrounding her injury.[7] Still, the court did not bar Dr. Granacher from testifying regarding Schneider's physical and neurological deficits. After all, the "credibility of a witness testifying to relevant evidence is always at issue[,]" *Myers v. Commonwealth*, 87 S.W.3d 243, 246 (Ky. 2002), and evidence tending to show that "circumstances may have blurred [a] witness' recollection of perceptions (e.g., physical injury, time lapse, etc.) is clearly admissible to reflect upon the credibility of" the witness. Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 4.30[1] (4th ed. 2003). The same is true in the matter *sub judice*, where Niceley sought to prove that Schneider's brain damage rendered her recall unreliable.

Simply put, the opportunity for Niceley to present Dr. Granacher's testimony as to Schneider's physical and neurological deficits was the opportunity to impeach her credibility. The trial court did not err by denying Dr. Granacher the opportunity to testify further that, based upon these physical and neurological deficits, Schneider's testimony was not credible. A witness's credibility is an issue left exclusively to the jury. *Fairrow v. Commonwealth*, 175 S.W.3d 601, 609 (Ky. 2005). Further, Niceley was given the opportunity to cross-examine Schneider

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which would bear upon Schneider's competency to testify. As such, we construe Niceley's second argument as being whether the trial court improperly limited Niceley's ability to impeach Schneider's credibility through Dr. Granacher's testimony.

[7] Niceley does not argue on appeal any error in this testimony.

regarding possible memory issues, and he does not argue this opportunity was hindered in any way.

IV. Niceley's Prior Bad Acts

The week before the trial in this matter, Schneider, with her mother's assistance, prepared a list of eleven specific instances when Niceley acted violently toward her or others, destroyed personal property, or ingested her prescription medication.[8] Niceley argues that the trial court erred by permitting the Commonwealth to use this writing in questioning Schneider, under the pretext that it refreshed her memory. He also argues that the trial court erred by failing to exclude the writing as the Commonwealth did not first disclose it to him under KRE 404(c). We disagree.

A criminal defendant is entitled to reasonable pretrial notice of the Commonwealth's intent to offer KRE 404(b) evidence as part of its case-in-chief. KRE 404(c). Here, on direct examination the Commonwealth elicited from Schneider that she had both good and bad memories of her marriage, but there was no inquiry into specific memories. On cross-examination, Schneider testified in response to Niceley's questions that she had believed he loved her. On redirect, the Commonwealth inquired and Schneider testified regarding her "bad memories" of Niceley during their marriage, as set forth above. Clearly, the Commonwealth did not offer this evidence as part of its case-in-chief, and Niceley did not dispute

[8] During a bench conference, the Commonwealth explained that it did not prompt Schneider to make the list and that it had not seen the list. However, the Commonwealth was made aware of the list in a meeting with Schneider a few days prior to her testimony.

that the testimony was relevant on rebuttal. Hence, Niceley was not entitled to notice of the evidence under KRE 404(c).

With regard to the manner in which Schneider's testimony was elicited, a writing may be used to refresh a witness's memory if it is shown that "'the witness has a memory to be refreshed,' and 'that it needs to be refreshed.'" *Disabled American Veterans, Dept. of Ky., Inc. v. Crabb*, 182 S.W.3d 541, 551 (Ky.App. 2005) (quoting Lawson, *supra* § 3.20[7]). Ultimately, since the evidence placed before the finder of fact is the witness's refreshed memory rather than the document used to refresh that memory, "a writing 'cannot be read [aloud and introduced into evidence] under the pretext of refreshing the recollection of the witness.'" Lawson, *supra* § 3.20[7] (quoting *Payne v. Zapp*, 431 S.W.2d 890, 892 (Ky. 1968)).[9]

Here, the Commonwealth asked Schneider on redirect whether she could tell the jury about some of the bad memories she had from her marriage. When Schneider unfolded a piece of paper, the Commonwealth asked whether Schneider had memory problems and whether she wrote things down to help her remember them. Defense counsel objected, arguing that Schneider had to attempt to testify without the notes before being "refreshed" by them, and that she could not simply read the notes. The trial court sustained the objection and instructed the

[9] Present memory refreshed is distinct from past recollection recorded, where the evidence is a writing which contains facts the witness cannot directly state from present memory. *Disabled American Veterans, Dept. of Ky., Inc. v. Crabb*, 182 S.W.3d at 551. In the latter, which is not at issue here, the writing must "have been made or adopted by the witness when the matter was fresh in the witness' memory and . . . reflect that knowledge correctly." KRE 803(5).

Commonwealth that it had to lay the proper foundation before attempting to refresh Schneider's memory.

When the redirect examination resumed, the Commonwealth again asked Schneider whether she could relate to the jury some of the bad memories she had from her marriage. Schneider began reading verbatim from the list, covering the first two items on the list.[10] Again, the trial court sustained defense counsel's objection, instructing the Commonwealth to first establish that Schneider could not answer the question without the notes. Pursuant to defense counsel's suggestion, the trial court also questioned Schneider, outside the jury's presence, about when and how the list was made, and by whom.[11] Following this examination, the trial court reiterated that although the Commonwealth could use the writing to refresh Schneider's memory, she could not read from the writing.

When the Commonwealth resumed its questioning, Schneider testified about an item on the list which stated that "it was not true that she didn't want to go out of the house." When Schneider again began reading directly from the list while testifying about a time when Niceley broke her cell phone, the trial court again sustained defense counsel's objection. The redirect examination resumed, and Schneider testified about a time when Niceley took and ingested her

[10] The first item was that Schneider once got her hair cut and Niceley punched her and held her head under water; the second was a time when Niceley broke the bathroom door and had to get a screwdriver to open it and let Schneider out.

[11] This in camera review was likely unnecessary since it is "settled that '[a]nything may in fact [be used to] revive a memory: a song, a scent, a photograph, an allusion, even a past statement known to be false.'" Lawson, *supra* § 3.20[7] (quoting *Hoffman v. United States*, 87 F.2d 410, 411 (9th Cir. 1937)). However, defense counsel was adamant at trial that the author and the timing of the writing were relevant, perhaps confusing the requirements for past recollection recorded, *see, supra* note 9.

prescription valium. While she was attempting to testify about a time when she was in the car with Niceley and he pulled a gun on another motorist, the trial court sustained defense counsel's objection regarding whether the Commonwealth could impeach Schneider's testimony. The Commonwealth ended its redirect examination.

In short, our review of Schneider's testimony shows that the trial court sustained each of defense counsel's objections to the manner in which the writing was used to refresh Schneider's memory. Further, to the extent that Niceley argues that Schneider's memory was not truly refreshed by the writing, we note that he did not advance this specific argument below. However, even if we assume that Schneider's memory was not refreshed, and she was simply parroting what she read from the list, any error was harmless. Niceley was given the opportunity to cross-examine Schneider regarding her testimony about bad memories from her marriage. Further, the "refreshed" testimony lasted a total of no more than twenty minutes (excluding bench conferences and the in camera hearing) during a month-long trial. Niceley is not entitled to relief on appeal.

V. Conclusion

The Kenton Circuit Court's judgment is affirmed.

ALL CONCUR.

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