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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001017-MR

SHAUN JECKER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 16-CR-002662

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Shaun Jecker appeals the Jefferson Circuit Court's May 30, 2018 judgment finding him guilty of assault in the second degree. Finding no error, we affirm.

BACKGROUND

This case has a convoluted fact pattern with lots of participants, yet at its core is quite simple. Jecker was involved in an altercation, leading to his being charged with, and eventually convicted of, second-degree assault of a woman he considered his "stepchild."

Though unmarried, Jecker and Melissa Bourne were involved in a romantic relationship for fourteen years. Bourne had an older daughter, Sabrina Carman. Carman and Jecker had a positive relationship; Carman viewed Jecker as a father figure and Jecker viewed her as a stepchild. Carman dated William Cecil, but also spent some time with her childhood friend, Michael Hill, who was also friends with Jecker. Then, the following occurred on July 20, 2016.

Hill picked Carman up and the two of them spent a few hours in his car near Bourne's place. Hill's girlfriend spotted them together and went to Hill's house, where Jecker was staying. Jecker gave the girlfriend Cecil's phone number. The girlfriend called Cecil and told him she caught Hill and Carman "hooking up." Cecil went to confront Carman. They got into an argument, which escalated to the point that Cecil assaulted Carman.

While Cecil and Carman fought, Bourne called Jecker to tell him about the assault. Jecker went to confront Cecil and Hill accompanied him. Jecker had a knife and Hill had a golf club. When they arrived, Cecil was gone.

However, Carman's and Bourne's anger shifted from Cecil to Jecker. They blamed Jecker for instigating the episode. The three exchanged words and, as with the former altercation, this one escalated, too. Jecker pushed Bourne and then Carman pushed Jecker. She threw a phone and hit Jecker in the back. Jecker turned and attempted to hit Carman. After a few missed swings, he secured Carman in a headlock and swung his arm toward her, with the knife in his hand. Carman attempted to dodge the first swing but was cut in the forehead with the knife. She put her arm up to block the next swing, but the knife badly slashed her arm. When she fell to the ground bleeding, Jecker fled.

Jecker was eventually apprehended and charged with first-degree assault. A jury found him guilty of second-degree assault and recommended six and one-half years in prison. The Jefferson Circuit Court agreed and entered judgment for the recommended term of imprisonment. This appeal followed.

STANDARD OF REVIEW

A reviewing court "will not overturn a trial court's evidentiary rulings absent an abuse of discretion." *McLemore v. Commonwealth*, 590 S.W.3d 229, 234 (Ky. 2019). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

ANALYSIS

Jecker presents three arguments. He claims the circuit court erred by: (1) preventing him from impeaching Carman's credibility regarding her use of benzodiazepine; (2) allowing the Commonwealth to reenact the confrontation between Carman and Jecker; and (3) denying him access to sealed documents used by law enforcement to locate him. We take each, in turn.

Impeachment

Jecker sought to cross-examine Carman as to whether she was under the influence of benzodiazepine during the altercation and, shortly afterward, when she gave her statement to police. He argues that, if so, her recollection would have been impaired. This would impeach the credibility of her trial testimony about what happened. The circuit court did not allow the impeachment, and here is why.

The Commonwealth had previously elicited testimony from Carman's emergency room doctor who treated her for severe blood loss and Class 4 shock. On cross-examination by Jecker, the doctor said these conditions would have given her some cognitive impairment resulting in the poor recollection of the event at the time she was admitted to the hospital. But Jecker asked the doctor nothing about benzodiazepine and, instead, waited for Carman to take the stand. At a sidebar to discuss Jecker's proposed line of questioning, the circuit court stated:

> You're saying that she had this in her system at the time and that it had caused her agitation. Now you're making

> these arguments. But why wouldn't you ask the doctor when he was here, hey, does . . . benzodiazepine cause agitation? I can hardly see where I would have prohibited you from asking that question because you asked the first one [regarding blood loss and shock]. But now we're in a situation where there's no medical testimony at all [on benzodiazepine]. You're just trying to throw it out there to the jury. . . . I can't even pronounce it, let alone, I don't even know what it is. And I'm saying these jurors are going to get it and you're going to make some connection between the two that is not based on the evidence that's been admitted in this case. So, I go back to what I said before, I'm not going to allow you to, uh, elicit that from this witness. However, if you can tie it in with some medical testimony, then tell me, and we have a different ball game. But until then, that's out, okay. That's the ruling. Let's move on.

(Video Record (V.R.) at 2/1/18 3:21:33-3:22:28).

Jecker considers this ruling error because KRE[1] 611(b) says "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." We conclude there was no error here for several reasons.

The circuit court focused first on Jecker's failure to ask the physician whether benzodiazepine causes agitation. We conclude the first reason the court prohibited the line of questioning is that it assumes unproven facts about the effect of benzodiazepine that could have been asked of the doctor but was not. The circuit court expressly stated as much. (*Id.* (question of Carman "is not based on

[1] Kentucky Rules of Evidence.

the evidence that's been admitted in this case")). KRE 611(a) allows the circuit court wide discretion to disallow questioning based on assumed facts.

Second, the circuit court's comments suggested its concern that the evidence Jecker was soliciting would mislead the jury, implying that the probative value of the evidence is outweighed by its prejudicial effect. KRE 403. We cannot say such a ruling is an abuse of discretion.[2]

Additionally, the rest of the rule upon which Jecker relies says, "In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination." KRE 611(b). Carman did not testify about benzodiazepine or whether she had ever used the drug.[3] Not allowing cross-examination of Carman as to a matter not addressed in the prosecution's direct examination is not an abuse of discretion under KRE 611(b).

Prosecution's Cross-examination

Jecker claims the court erred by allowing the prosecutor to question Hill in a way prohibited by *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky. 2007), and *Dillon v. Commonwealth*, 475 S.W.3d 1 (Ky. 2015). We disagree.

[2] Relevancy may also have been in doubt given Carman's psychological report stating before the assault she was "fully oriented and alert, having no deficits with attention/concentration, and was absent of any delusion, hallucination, or any other distortion of reality." (Record (R.) at 182).

[3] Carman did testify on avowal that "a few days prior" she had taken a Klonopin tablet prescribed for her boyfriend.

In *Holt*, the Kentucky Supreme Court examined the propriety of a prosecution practice:

> where a witness has made extra-judicial statements to the lawyer prior to trial. Thereafter, when the witness fails to give testimony consistent with the prior statements, the lawyer takes such broad liberties in the mode of examination as to essentially give testimony as to the substance of the prior statement.

219 S.W.3d at 733. The opinion provides the specific example of "improper questioning by the prosecutor of a prosecution witness, Reggie Bell." *Id.* Setting out the direct examination of Bell, the Court noted that, "despite Bell's denial of the substance of the statements [of confession] attributed to Appellant, the prosecutor asserted [by her questions] on at least four occasions that Bell told her that Appellant had admitted the crime. . . ." *Id.* at 734. The Court further noted that "[t]his placed the credibility of the prosecutor before the jury, and from the form of the questions, firmly represented to it that Bell had told her that Appellant had admitted the crime." *Id.*

Holt identifies this impropriety as "more than some technical violation of evidence rules or proper conduct by lawyers. By means of the prosecutor's assertions, statements attributed to Appellant were placed before the jury without any witness saying that Appellant made such a statement." *Id.* at 739. The same circumstances were present in *Dillon*.

"*Holt* . . . addressed facts almost identical to those" in *Dillon*. 475 S.W.3d at 20. In *Dillon*, the Supreme Court repeated that there is "'no doubt that assertions of fact from counsel as to the content of prior conversations with witnesses have the effect of making a witness of the lawyer . . . .' [T]he 'practice is improper and, subject to harmless error review, is an appropriate basis for reversal . . . .'" *Id*. (quoting *Holt*, 219 S.W.3d at 739, 738).

These cases and those upon which they rely are "about the prosecutor, in the presence and hearing of the jury, offering his own unsworn statements as evidence . . . . [S]uch 'evidence' may not be heard by the jury, regardless of the context." *Id.* at 21 (citation and internal quotation marks omitted). That happened in both *Holt* and *Dillon*.

Both *Holt* and *Dillon* emphasized that the prosecutor had persisted in repeating the substance of the witness's prior statement as a statement of fact, despite his denial. *Holt*, 219 S.W.3d at 734 ("prosecutor asserted on at least four occasions that Bell told her that Appellant had admitted the crime"); *Dillon*, 475 S.W.3d at 20 ("prosecutor tried to impeach the witness by referring repeatedly to a prior conversation . . . . [P]rosecutor specifically (and repeatedly) referenced a conversation between himself and [the witness] as the source of the statements, with the prosecutor repeating the statements . . . ."). This repetition contributed to the mutation of the prosecutor's statement from question to testimony. *Holt*, 219

S.W.3d at 735 ("commonwealth's attorney['s] . . . repetition of [witness's prior contradictory statement], not under oath, in the hearing of the jury, was incompetent evidence, and of a character very damaging to the rights of the appellant" (quoting *Commonwealth v. Cook*, 9 Ky. L. Rptr. 829, 86 Ky. 663, 7 S.W. 155 (1888)); *see also Dillon*, 475 S.W.3d at 20 (prosecutor on "direct examination . . . was relying on his own unsworn repetition of [the witness's] statements to confront the man").

The Supreme Court identified another critical circumstance common to both *Holt* and *Dillon*. The prosecutor was allowed in both cases to ask leading questions despite having called the witness on direct examination. The prosecutor thus succumbed to "the temptation to place the substance of the alleged statement before the jury from her lips rather than awaiting the testimony of the witness." *Holt*, 219 S.W.3d at 739.

In the case under review, Hill was not called by the prosecution and, therefore, leading questions were permissible on cross-examination. However, the absence of the prohibition on leading questions does not eliminate the temptation referenced in *Holt* "to place the substance of the alleged statement before the jury from [the prosecutor's] lips . . . ." *Id.* When leading questions are allowed, it may be that the temptation is even greater. With that in mind, we look to the record.

On direct examination while testifying for Jecker, Hill testified he only saw Jecker strike Carman once. This testimony was contrary to the Commonwealth's expectation, based on the prosecutors' pre-trial conversation with Hill during which he participated in a reenactment of the crime and told prosecutors Jecker struck Carman twice. To point out the inconsistent statement during cross-examination, the prosecutors wanted to reenact the crime again while asking Hill whether it accurately reflected the previous demonstration in which he participated. Jecker objected that the reenactment was improper impeachment. Said Jecker, "[I]f he says, 'No, that's not what I did,' then the jury has seen them [the prosecutors] testify . . . ." (V.R. at 2/2/18 1:51:50-1:51:58). The circuit court overruled the objection. We begin by considering the function of cross-examination itself.

Jecker asserts that Hill's disagreement with a leading cross-examination question converts the prosecutor's question into testimony and makes her an unsworn witness. That is not so. "[T]he function of cross-examination is such that some allowance must be made for probing in the dark, as well as for the hope that the witness may admit the truth of something counsel has heard or knows but may not be able to prove." *Alexander v. Commonwealth*, 463 S.W.2d 334, 339 (Ky. 1971). The law does not restrict a prosecutor to questions that only prompt the answer, "Yes." Such a rule would "require that he know the answers in

advance, and be ready to refute false answers with competent evidence, [and that] would severely restrict the value of cross-examination." *Id.*

"The scope of investigative probing during the course of cross-examination must be circumscribed by a criterion of fairness and good faith . . . ." *Id.* Nothing suggests the prosecutor's questions, or the reenactment itself, were not in good faith.

However, good faith cross-examination alone is not enough. A prosecutor who refuses to take "No" for an answer and repeats the substance of a prior interview when cross-examining a witness may still violate the rule in *Holt* and *Dillon*, even when asking leading questions in good faith. Therefore, we still must decide whether cross-examination of Hill fairly amounted to the prosecutor's "offering h[er] own unsworn statements as evidence[.]" *Dillon*, 475 S.W.3d at 21. The circuit court concluded it did not. Our close review of the record convinces this Court that the circuit court did not abuse its discretion by so concluding.

It is obvious from the record that the prosecutor's memory of the pre-trial reenactment of the crime was mildly different than that of Hill. Fleshing out how those recollections differed, the prosecutor began by asking Hill whether he even remembered the prior reenactment, and he said he did. About four questions in, she asked Hill, "Do you remember . . . seeing [Jecker] swing back with his left arm[,]" which he later answered, "Like I said, I seen his arm come back out from

behind, you know whatever happened, happened in front of him in a headlock." When the prosecutor specifically asked whether he had seen a first strike hit Carman's forehead, followed by a second strike, Hill responded, "I don't recall the first strike." (V.R. at 2/2/18 1:49:37-1:53:02).

At this point, the prosecutor repeated Hill's answer and, by her intonation only, made it a declarative question. His answer clarified that he could not and did not see the first strike as it landed, but that he did see Jecker draw his arm back for that first strike. That part of the cross-examination went as follows:

> Commonwealth: You don't recall the first strike?
>
> Hill: I did not see no first strike. Like I said, I seen his arm come back out from behind, you know whatever happened, happened in front of him in a headlock. And her arm was in the headlock. But the only time I seen his hands when he came back at the end and dropped her, like I said. And I focused on her fallin', and he was at my car next time I seen him.
>
> Commonwealth: But the main thing you do remember is that [Jecker] has [Carman] in a headlock, correct?
>
> Hill: Yeah that's what it looked like.

(V.R. at 2/2/18 1:53:02-1:53:37).

This cross-examination does not approach the impropriety rebuked in *Holt* and *Dillon*. Even if it did, it would be "subject to harmless error review . . . ."

Dillon, 475 S.W.3d at 20 (quoting *Holt*, 219 S.W.3d at 738). Here, the cross-examination was not only harmless, it may have helped Jecker's defense. At least his closing argument implies as much when he said:

> He [Hill] told you that he never saw [Jecker] swing a knife at her. At [Carman]. And [the prosecutor] made a big deal about the reenactment that they allegedly or apparently did at her office a week ago last Monday. And even in the face of that, of being confronted with the reenactment, he said, "I never saw [Jecker] swing the knife."

Jecker's closing may have deviated slightly from the Commonwealth's cross-examination as it cast Hill's testimony in a light most favorable to him. Still he saw Hill's cross-examination as being to his advantage. And perhaps it was considering that the jury convicted Jecker of the lesser assault crime.

In the end, we find no abuse of the circuit court's discretion.

Review of Sealed Documents

The circuit court reviewed certain documents *in camera* and denied Jecker access to them. The documents assisted police in locating Jecker after he fled the scene. Jecker asks this Court to review the documents under seal to determine whether they may be exculpatory evidence to which he is entitled under RCr[4] 7.24(2), RCr 7.26(1), or the Fourteenth Amendment's Due Process Clause.

[4] Kentucky Rules of Criminal Procedure.

"If, as here, discovery is denied, a conviction occurs, and an appeal is taken, the appellate court, upon request, can review the records and determine whether the trial judge's ruling was an abuse of discretion." *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003).

The Commonwealth notes that these documents were generated by a criminal intelligence system operating with federal law enforcement pursuant to the Omnibus Crime Control and Safe Streets Act of 1968 and, pursuant to 28 C.F.R.[5] § 23.1, such documents are to remain private. We have reviewed the materials and conclude the circuit court did not abuse its discretion in denying Jecker access to the sealed documents.

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's judgment sentencing Jecker to six and one-half years for second-degree assault.

ALL CONCUR.

[5] Code of Federal Regulations.

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