2011 WL 6826230
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Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Supreme Court of Kentucky.

Hope Renee WHITE, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2010–SC–000626–MR
|
Dec. 22, 2011.

Synopsis

Background: Defendant was convicted in the Wayne Circuit Court, Vernon Miniard, Jr., J., of murder. Defendant appealed.

Holdings: The Supreme Court of Kentucky held that:

trial court's error in failing to instruct jury on first-degree manslaughter was prejudicial;

instruction on voluntary intoxication defense was not warranted; and

evidence that defendant passed polygraph test was not admissible.

Reversed and remanded.

Schroder, J., concurred in part and dissented in part.

On Appeal from Wayne Circuit Court, No. 09–CR–00079; Vernon Miniard, Jr., Judge.

Attorneys and Law Firms

Steven Jared Buck, Assistant Public Advocate, Department of Public Advocacy, Frankfort, KY, Counsel for Appellant.

Jack Conway, Attorney General of Kentucky, Todd Dryden Ferguson, Assistant Attorney General, Office of Attorney General, Criminal Appellate Division, Frankfort, KY, Counsel for Appellee.

MEMORANDUM OPINION OF THE COURT

*1 A Wayne Circuit Court jury found Appellant, Hope Renee White, guilty of murder, for which she received a thirty-year prison sentence. She now appeals as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erred to her substantial prejudice by denying her tendered instructions, by inhibiting her from questioning a witness with respect to specific instances of untruthfulness on the part of a prosecution witness, and by denying her request to introduce evidence that she passed a state-police-issued polygraph examination when questioned about the victim's death.

I. BACKGROUND

On August 18, 2009, Appellant was indicted for murdering Julie Burchett. The charges arose from an incident that occurred on July 18, 2008, in which Appellant stabbed Burchett for having an affair with her boyfriend, Bobby Buster. At trial, the jury found Appellant guilty of murder and recommended a thirty-year prison sentence. This appeal followed.

Because we agree with Appellant that the trial court erred to her substantial prejudice when it denied her request for an instruction on first-degree manslaughter, we reverse Appellant's conviction for murder and remand for a new trial. However, we address all of Appellant's arguments, as these issues will likely recur on retrial.

II. ANALYSIS

A. Instructions

Appellant first argues that the trial court erred when it denied her request for instructions on several lesser included offenses and voluntary intoxication. In *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky.2010), we succinctly explained the trial court's duty with respect to lesser included offenses and affirmative defenses:

> [A] trial court is required to instruct the jury on affirmative defenses and lesser-included offenses

Appendix 1

> if the evidence would permit a juror reasonably to conclude that the defense exists or that the defendant was not guilty of the charged offense but was guilty of the lesser one. *Fredline v. Commonwealth,* 241 S.W.3d 793 (Ky.2007); *Fields v. Commonwealth,* 219 S.W.3d 742 (Ky.2007). It is equally well established that such an instruction is to be rejected if the evidence does not warrant it. *Payne v. Commonwealth,* 656 S.W.2d 719 (Ky.1983).

In that decision, we further noted that a trial court's decision not to give an instruction is reviewed for an abuse of discretion. *Id.* (*citing Crain v. Commonwealth,* 257 S.W.3d 924 (Ky.2008)).

In this case, the Commonwealth called several witnesses who gave varying accounts of people, places, times, and events. For instance, Jason Miller testified that he, Appellant, Burchett, Buster, and Seth Frost were "getting high" at the lake. According to Miller, these individuals, along with Darrell White, Johnny White, Adam Manning, and Scotty Stanton, later attended a party at Appellant's mother's house, and all were drinking alcohol and "getting high." At the party, Miller heard Appellant and Buster arguing about Buster having an affair with Burchett. Miller then saw Appellant approach Burchett and say, "Julie, tell me it ain't true. Tell me that you haven't been sleeping with [Buster]." Miller further testified that Burchett then started crying and went to the bathroom; when Burchett returned, Appellant walked toward her with a knife and stabbed her once in the chest.

***2** Manning testified that he and others were drinking alcohol at the party, but he saw no drugs. He further testified that he saw Appellant cussing and screaming at a woman over "some boy." According to Manning, the two women began grappling and then Appellant pulled an object from under her skirt and stabbed the other woman.

Stanton testified that he walked into the party with Manning and saw Appellant and another woman arguing, and then fighting and pulling each other's hair for approximately 15 seconds. According to Stanton, he never saw a knife or any blood and the two women were still fighting when he left. Appellant, Buster, Darrell White, and Johnny White were subsequently called by defense counsel and all denied attending the party. belief that a defendant was so voluntarily intoxicated that he did not form the requisite intent to commit murder does not require an acquittal, but could reduce the offense from intentional homicide to ... second-degree manslaughter." *Id.* at 857 (citations omitted).

Following *Slaven,* in *Thomas v. Commonwealth,* 170 S.W.3d 343, 346 (Ky.2005), this Court reversed the appellant's convictions for intentional assault in the first degree and of wanton assault in the second degree and remanded for a new trial because the trial court failed to instruct the jury on assault under extreme emotional disturbance. In so doing, the Court pointed out that KRS 507.020(1)(a) provides that, in any prosecution for assault in the first, second, or third degree, "in which intentionally causing physical injury or serious physical injury is an element of the offense, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance...." *Id.* at 347.

KRS 507.020(1)(a) provides that "a person shall not be guilty [of murder] if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." However, extreme emotional disturbance does not constitute a defense to first-degree manslaughter. *Id.; see also* KRS 507.030 (stating that a person is guilty of first-degree manslaughter if he or she intentionally causes the death of another person while acting "under the influence of extreme emotional disturbance"). "Thus, if [a] jury finds that [a defendant] committed the intentional act of murder, but finds the existence of extreme emotional disturbance, then the crime must be reduced to manslaughter in the first degree." *Holbrook v. Commonwealth,* 813 S.W.2d 811, 815 (Ky.1991), *overruled on other grounds by Elliott v. Commonwealth,* 976 S.W.2d 416 (Ky.1998).

Based upon KRS 507.020(1)(a) and our decisions in *Slaven* and *Thomas,* we consider the trial court's refusal to instruct on first-degree manslaughter as a lesser included offense of murder to be prejudicial error. As in *Slaven,* we refuse to countenance an instruction for extreme emotional disturbance without a contemporaneous instruction for first-degree manslaughter.[1] Simply put, "[i]f there is an issue whether the defendant was acting under the influence of extreme emotional disturbance, this instruction must be accompanied

by an instruction on First–Degree Manslaughter as a lesser included offense...." 1 Cooper, Kentucky Instructions to Juries (Criminal) § 3.21 (5th ed.2011); *see also Springer v. Commonwealth*, 998 S.W.2d 439, 452–453 (Ky.1999) (concluding that, if the evidence is the same on retrial, the appellant would be entitled to instructions on first-degree manslaughter as a lesser included offense of murder and a concomitant instruction on extreme emotional disturbance).

***3** Because the trial court abused its discretion in denying Appellant's requested instruction, we reverse Appellant's conviction for murder and remand for a new trial. Since Appellant's other allegations of error are likely to recur on remand, we also address them.

2. Voluntary Intoxication

Under KRS 501.080(1), voluntary intoxication is a defense to a criminal charge only if the intoxication "[n]egatives the existence of an element of the offense." We have consistently recognized that a defendant must set forth sufficient evidence to justify such an instruction:

> [E]vidence of intoxication will support a criminal defense only if the evidence is sufficient to support a doubt that the defendant knew what she was doing when the offense was committed. In order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing. *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112, 117–18 (1990); *Meadows v. Commonwealth*, Ky., 550 S.W.2d 511 (1977); *Jewell v. Commonwealth*, Ky., 549 S.W.2d 807 (1977), *overruled on other grounds*, *Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981).

Springer, 998 S.W.2d at 451.

As noted, Miller testified that Appellant was "getting high" at the lake and the party. Manning testified that persons were drinking alcohol at the party, although he never confirmed that this included Appellant.

The testimony of Miller and Manning only tangentially establishes that Appellant was intoxicated at the incident, as none of these witnesses specifically described Appellant as being intoxicated. However, even if we assumed Appellant was intoxicated, we do not believe their testimony set forth evidence sufficient to support a doubt that she knew what she was doing when the offense was committed. In fact, Miller heard Appellant accost Burchett immediately prior to the stabbing, stating "Julie, tell me it ain't true. Tell me you haven't been sleeping with Bobby."

Because the testimony of Miller and Manning did not establish sufficient evidence, the trial court did not abuse its discretion in denying an instruction on voluntary intoxication, as well as second-degree manslaughter and reckless homicide.

B. Inhibited Questioning

Appellant next alleges that the trial court erred when it prohibited her defense counsel from questioning Corbin Police Officer Tim Baker with respect to specific instances of untruthfulness on the part of Manning, who was a prosecution witness. At trial, Manning testified that he saw Appellant and another woman grappling, and then saw Appellant pull an object from under her skirt and stab the other woman. Appellant subsequently called Officer Baker, who testified that he was well-acquainted with Manning through his work as a police officer and considered him to be a liar. On cross-examination, Baker-confirmed that Manning would have a fairly good knowledge of what a methamphetamine lab looked like and that he was known for being a "partier." In response to the prosecutor's question as to whether Baker had ever questioned Manning with respect to someone else's conduct, Baker testified that he had only questioned Manning about something he had caught Manning doing.

***4** On redirect, defense counsel attempted to ask Baker about what Manning would do whenever he encountered Manning in his line of work. The trial court, though, sustained the prosecutor's objection to counsel's attempted use of specific instances of conduct, but allowed counsel to ask additional questions by avowal. During his avowal testimony, Baker stated that he had encountered Manning quite a few times and arrested him two to three times. The first time Baker stopped Manning's car, Baker observed him stuff syringes over his visor, yet Manning claimed to know nothing about the

syringes until Baker removed them. In those situations, Baker asserted that Manning cried and lied, and that he had lied in every interaction he had with Baker. According to Baker, drug officers had used Manning to provide information on other people in the past, but were no longer willing to do so because he had lied to them so many times.

Appellant contends that the trial court erred because Baker's testimony complied with KRE 608(a) and violated her right to present a defense.[2] We address each separately.

1. KRE 608(a)

KRE 608(a) states that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," with the limitation that "the evidence may refer only to character for truthfulness or untruthfulness...." According to Appellant, Baker's testimony complied with this rule because it was evidence in the form of reputation. Appellant complains that, due to the trial court's ruling, the jury heard Baker say he thought Manning was a liar, yet did not hear him comment on Manning's broader reputation for untruthfulness within the Corbin law enforcement community.

Appellant's argument, though, ignores that her defense counsel asked Baker what Manning would do whenever he encountered Manning in his line of work—not to describe Manning's broader reputation for untruthfulness. Moreover, Baker specifically testified on avowal that drug officers were no longer willing to use Manning as an informant because he had lied to them so many times rather than generally describe Manning's reputation for lying within the Corbin law enforcement community.[3]

If Appellant's counsel had framed the question differently, e.g., by inquiring as to Manning's reputation within the community instead of specific instances of conduct, we might agree that Baker's testimony complied with KRE 608(a). However, in light of defense counsel's inquiry, as well as Baker's testimony on avowal, we cannot say that the trial court erred in prohibiting further questioning.

2. Right to Present a Defense

We follow the United States Supreme Court's unequivocal pronouncement that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotations omitted); *see also Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). However, "state and federal rulemakers have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials" because a "defendant's right to present relevant evidence is not unlimited." *U.S. v. Scheffer*, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (emphasis added). This latitude is impermissibly exceeded when an accused's right to present a defense "is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are *arbitrary or disproportionate* to the purposes they are designed to serve." *Holmes*, 547 U.S. at 324 (internal quotation marks omitted) (emphasis added).

**5 As discussed, Appellant disputed the trial court's decision to prohibit her from further questioning Officer Baker. However, she fails to argue that our evidentiary rules are either "arbitrary or disproportionate to the purposes they are designed to serve." And, as we noted in *Mills v. Commonwealth*, 996 S.W.2d 473, 489 (Ky.1999), "*Chambers* ... does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense." As a result, we cannot say that the trial court's ruling violated Appellant's right to present a defense.[4]

C. Polygraph Exam

Appellant contends that the trial court erred when it denied her request to introduce evidence that she passed a state police-issued polygraph examination when questioned about Burchett's death. However, this Court "has held repeatedly and consistently that it does not yet consider such evidence scientific or reliable." *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky.1984) (footnote omitted). In fact, in *Morton v. Commonwealth*, 817 S.W.2d 218, 221–222 (Ky.1991), this Court declared that "under no circumstances should polygraph results be admitted into evidence" and thus rejected the appellant's complaint that the trial court erred by refusing to admit the result of his polygraph examination.

Appellant, though, asks us to reexamine our precedent, as she argues that the exclusion of her examination results impaired her right to present a defense. In support, Appellant points to our decision in *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky.2002).[5]

In *Rogers*, this Court found that the trial court committed reversible error when it prohibited the appellant from introducing evidence that he confessed to committing a murder only after a law enforcement officer informed him that he had failed a polygraph examination. 86 S.W.3d at 37–38. In so doing, the Court held that, in certain cases, "the defendant's right to present a defense trumps our desire to inoculate trial proceedings against evidence of dubious scientific value." *Id.* at 39. As a result, "although polygraph evidence is not admissible in Kentucky, a defendant—and only the defendant—has the right, as a matter of trial strategy, to bring evidence of a polygraph examination before the jury to inform the jury as to the circumstances in which a confession was made." *Id.* at 40.

We do not believe the *Rogers* decision supports Appellant's contention. Although *Rogers* acknowledged the significance of the right to present a defense, it did so within the context of a confession; it did not contravene our precedent with respect to the results of polygraph examinations. In fact, the opinion itself reiterated that "polygraph evidence is not admissible in Kentucky." *Id.* at 40. Simply put, *Rogers* was a narrow decision that recognized the right of a defendant to set forth the relevant background—and, thus, an explanation—as to his or her confession.

***6** Our decision in *Morton* establishes clear precedent as to the admissibility of the results of a polygraph exam. Precedent must be given considerable weight because *stare decisis* is "an ever-present guidepost" in appellate review and requires "deference to precedent." *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 795 (Ky.2009). *Stare decisis* ensures that the law will "develop in a principled and intelligible fashion" rather than "merely change erratically." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky.2008). "It is the difference between the 'rule of law' and the 'rule of man.' " *Sayre v. Commonwealth*, 2010–SC–000482–MR, 2011 WL 4431010, at *4 (Ky. Sept.22, 2011).

We see no sound reason for ignoring our precedent in this case. *See Saleba v. Schrand*, 300 S.W.3d 177, 183 (Ky.2009) (stating that we ignore *stare decisis* only for "sound reasons to the contrary"). Accordingly, we hold that the trial court did not err by refusing to admit evidence that Appellant passed a state police-issued polygraph examination.

III. CONCLUSION

For the foregoing reasons, set out in section II(A)1 of this opinion, Appellant's murder conviction is reversed and the matter is remanded to the trial court for a new trial consistent with this opinion.

MINTON, C.J.; ABRAMSON, CUNNINGHAM, NOBLE, SCOTT, and VENTERS, JJ ., concur. SCHRODER, J., concurs in part and dissents in part, believing that the evidence was sufficient to support a jury instruction on voluntary intoxication.

All Citations

Not Reported in S.W. Rptr., 2011 WL 6826230

Footnotes

1 If Appellant had not been entitled to the murder instruction which obligated the Commonwealth to disprove extreme emotional disturbance, we would have deemed the trial court's refusal to instruct on first-degree manslaughter to be harmless error. However, we believe the varying accounts set forth by the Commonwealth warranted an instruction for extreme emotional disturbance. *See Benjamin v. Commonwealth*, 266 S.W.3d 775, 783 (2008) ("This series of events, *while not necessarily establishing that extreme emotional disturbance existed*, is wholly sufficient to warrant an instruction for EED for the jury's benefit.").

Specifically, we note that Miller testified that Appellant and Buster were arguing about Buster having an affair with Burchett and that Appellant then confronted Burchett about the affair before stabbing her. Moreover, Manning testified that he saw Appellant cussing and screaming at a woman over "some boy" before they began grappling while Stanton saw Appellant and another woman arguing and then fighting. Such a narrative,

albeit jumbled, is analogous the facts underlying our decision *Benjamin,* wherein we determined that the trial court committed reversible error by failing to instruct the jury on extreme emotional distress. 266 S.W.3d at 783. In that case, evidence was introduced that the appellant was enraged because his wife had been involved in an affair:

> The night before the homicide, Marcus Benjamin was confronted with allegations of infidelity as well as the news that his wife had been engaging in an extramarital affair with a family member. The following morning, the victim returned and the argument between the two resumed, this time including assertions that Benjamin would never see his children again. Further, Benjamin claims that he was physically attacked by the victim during this final argument, at which point the altercation turned deadly.
>
> *Id.* at 783.

2 Appellant failed to argue that the court's ruling impaired her right to present a defense in her initial brief, instead raising the issue in her reply brief and thereby inhibiting the Commonwealth's ability to respond. However, we address her argument despite this omission, as it may recur on retrial.

3 We note that "[m]odern conditions have created a need for a different concept of 'reputation,' one that looks for what is said about a person by and among people with whom he or she associates in the ordinary walks of life." R. Lawson, Kentucky Evidence Law Handbook, § 4.20[4] (4th ed.2003) (footnote omitted).

4 *See Fresh v. Commonwealth,* 2009–SC–000797–MR, 2011 WL 1642275 (Ky. April 21, 2011); *Gatewood v. Commonwealth,* 2009–SC–000644–MR, 2011 WL 2112566 (Ky. May 19, 2011).

5 Appellant also directs us to *Mitchell v. Commonwealth,* 908 S.W.2d 100 (Ky.1995), *overruled on other grounds by Fugate v. Commonwealth,* 993 S.W.2d 931 (Ky.1999), and *United States v. Sherlin,* 67 F.3d 1208 (6th Cir.1995). In *Mitchell,* this Court adopted the *Daubert* test for the admissibility of scientific evidence. 908 S.W.2d at 101. In *Sherlin,* the Sixth Circuit held that "[t]he decision to exclude from evidence the results of a polygraph examination is within the sound discretion of the trial court" and then outlined the analysis court must follow in exercising such discretion:

> In order to determine whether the results of a polygraph examination should be admitted at trial over an opponent's objections, this court has established a two-step analysis. First, the evidence must be relevant, and second, its probative value must outweigh the prejudice. *United States v. Barger,* 931 F.2d 359, 370 (6th Cir.1991).

67 F.3d at 1216. However, without further explanation, we fail to see the connection between those cases and the matter before us.

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Supreme Court of Kentucky.

Hope Renee WHITE, Appellant

v.

COMMONWEALTH OF KENTUCKY, Appellee

2013–SC–000321–MR

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DECEMBER 18, 2014

Synopsis

Background: Defendant was convicted in the Circuit Court, Wayne County, Vernon Miniard, Jr., J., of murder, and she appealed. The Supreme Court, 2011 WL 6826230, reversed and remanded for new trial. On retrial, defendant was again convicted of murder, and she appealed.

Holdings: The Supreme Court held that:

defendant's unredacted interviews with police which included references to polygraph tests did not open door to evidence of results of examination;

victim's toxicology screening was proper subject of medical examiner's cross-examination, after defendant affirmatively waived right to confront analyst who prepared toxicology report;

toxicology report was relevant;

error in exclusion of toxicology report was harmless; and

prosecutor did not impermissibly comment on detective's credibility.

Affirmed.

Scott, J., filed opinion concurring in part and dissenting in part.

ON APPEAL FROM WAYNE CIRCUIT COURT, HONORABLE VERNON MINIARD, JR., JUDGE, NO. 09–CR–00079

Attorneys and Law Firms

COUNSEL FOR APPELLANT: Steven Jared Buck, Assistant Public Advocate

COUNSEL FOR APPELLEE: Jack Conway, Attorney General of Kentucky, Todd Dryden Ferguson, Assistant Attorney General

MEMORANDUM OPINION OF THE COURT

*1 Hope Renee White appeals as a matter of right from a judgment of the Wayne Circuit Court sentencing her to a twenty-five year prison term for murder. Ky. Const. § 110(2)(b). White raises three issues on appeal: 1) the trial court abused its discretion when it prohibited her from testifying about the results of her polygraph test; 2) the trial court abused its discretion when it denied her request to question the medical examiner about the victim's toxicology results; and 3) the trial court erred when it did not admonish the jury following a prosecutor's remark regarding a witness's testimony. We now affirm the judgment of the Wayne Circuit Court.

Appendix 2

FACTS

On August 18, 2009, Appellant Hope White was indicted for the July 2008 murder of Julie Burchett. Burchett's body was found in an abandoned car in Monticello, Kentucky. Burchett had been stabbed nine times. White was convicted and sentenced to serve a thirty-year prison term. This Court reversed and remanded White's conviction in *White v. Commonwealth*, No. 2010–SC–000626, 2011 WL 6826230 (Ky. Dec. 22, 2011), due to the trial court's failure to instruct the jury on the lesser included offense of first-degree manslaughter. On retrial, White was again convicted of murder and sentenced to serve a twenty-five year prison term. This appeal followed. Additional facts will be referenced as they become relevant to the issues discussed.

ANALYSIS

I. Trial Court's Exclusion of Polygraph Examination Results Was a Proper Exercise of Discretion.

Prior to the commencement of White's first trial, the Commonwealth moved to prohibit White from introducing the results of her own polygraph examination. The trial court ruled in favor of the Commonwealth and the evidence was excluded. On White's first appeal, this Court held that the trial court properly excluded the results of the polygraph examination. *White*, 2011 WL 6826230 at *6.

The Commonwealth again successfully moved to exclude the results of White's polygraph examination prior to the start of her second trial. Then, during the direct examination of Kentucky State Police Detective Douglas Boyd, the Commonwealth played an audio recording of an interview with White and detectives on the day preceding her arrest. In that unredacted recording from June 29, 2009, the jury heard several references to a polygraph examination, including a detective's statement that he "polygraphed" White, and statements from White herself that she was polygraphed on her birthday, that she "took that lie detector test," and that she "passed all the lie detector tests," reiterating that she "passed them all." The recording from the 2009 interview lasted roughly twenty-nine minutes. The Commonwealth played a second audio recording from an earlier, July 28, 2008 police interview with White. In that recording, the jury heard White say, "You can do anything you want on me. Lie detector test, whatever. I did not do anything to that girl." Minutes later, a detective is heard saying, "If you're not guilty of this crime, I'd like to have a polygraph test, have you take one of those. That way I can clear you." White replied, "I'll do that for you." The Commonwealth then stopped the recording and the parties approached the bench.

*2 In the ensuing bench conference, the Commonwealth stated that the forthcoming portion of the recording needed to be skipped over. White's defense counsel objected, arguing that evidence concerning the polygraph examination had already come in. In response, the Commonwealth claimed that the mere mention of the word "polygraph" was harmless and inadvertent, but that any reference to the results of the polygraph test would constitute reversible error. Defense counsel argued that the effect of the reference to the examination without revealing the result was prejudicial to White and would deprive her of a fair trial. Of course, there had already been reference to the results of the polygraph, including by White herself who was recorded as twice saying she "passed" the exam. After a lengthy deliberation, the trial court ultimately ruled that all further evidence regarding White's polygraph would be excluded based upon the earlier ruling of this Court. The trial court admonished the jury not to consider any references to a polygraph examination in their deliberations.

On appeal, White contends that she should have been permitted to disclose the results of the polygraph examination in order to cure the Commonwealth's introduction of the inadmissible references to the polygraph test. White maintains that upon hearing that the officers would "clear" her if she took a polygraph examination, the jury would presume that she ultimately failed the examination given the fact that the investigation continued. She suggests that she should have been allowed to examine the detectives about the result of the examination and she should have been able to testify about it as well. White's argument presents the doctrine of curative admissibility, or "opening the door," where a party introduces inadmissible evidence in order to negate, explain, or rebut inadmissible evidence first offered by the opposing party. *See* Robert G. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 1.10[4], 41–45 (5th ed.2013). This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky.2000).

This Court has consistently held that the results of polygraph examinations are inadmissible. [1] *Stallings v. Commonwealth*, 556 S.W.2d 4 (Ky.1977); *Baril v. Commonwealth*, 612

S.W.2d 739 (Ky.1981); *Henderson v. Commonwealth*, 507 S.W.2d 454 (Ky.1974). We have likewise called for the exclusion of evidence that a witness or defendant has taken a polygraph examination for the purpose of bolstering or attacking credibility. *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky.1984) (*citing Perry v. Commonwealth*, 652 S.W.2d 655 (Ky.1983)). Going further, the Court in *Morgan v. Commonwealth* declared that the introduction of an inference that a defendant has taken and failed a polygraph examination is reversible error. 809 S.W.2d 704 (Ky.1991). To put it plainly, "any reference to a polygraph examination is inappropriate." *Brown v. Commonwealth*, 892 S.W.2d 289, 291 (Ky.1995).[2]

We agree that the Commonwealth's submission of the unredacted police interviews violated this Court's well-established prohibition against the introduction of evidence regarding a polygraph. However, White's case is readily distinguishable from *Morgan*, where a police interrogator testified that he possessed "special interrogation skills" and that the defendant's interrogation took place in a room with a polygraph machine. 809 S.W.2d at 705. As White concedes, and the Commonwealth reiterates, the jury heard from the 2009 police interview that she took and passed a polygraph examination. We reject the notion that the fact that the Commonwealth played the two interviews out of chronological order created the inference that White failed the exam, as the 2009 interview plainly suggests that she passed. Juries are presumed to possess common sense. *See Mills v. Commonwealth*, 996 S.W.2d 473, 491 (Ky.1999) (*overruled other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky.2010)). The reasonable inference drawn thereon was not that she failed the examination, as White suggests, but that she took the examination at some time between the 2008 and 2009 interviews *and passed*. We conceive no prejudice where the net effect of the introduction of the two interviews was that the jury heard that the detectives asked White to take a polygraph examination, which she readily agreed to take, and ultimately passed.

***3** White was not entitled to invoke curative admissibility in order to submit inadmissible evidence of the polygraph results. This Court has held that such evidence shall not be countenanced even in cases where the parties agree to the admissibility thereof. *See Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky.1991); *Conley v. Commonwealth*, 382 S.W.2d 865 (Ky.1964). The reason for our general exclusion of polygraph evidence is that such proof is considered unscientific and unreliable, yet wielding an "inherent propensity to influence the jury." *Morgan*, 809 S.W.2d at 706. The trial court was not compelled under the doctrine of curative admissibility to admit further evidence of White's polygraph results where this Court has declared that "under no circumstances should polygraph results be admitted." *Morton*, 817 S.W.2d at 222.

The trial court's decision to admonish the jury not to consider any references to the polygraph was appropriate under the circumstances. *See Stallings*, 556 S.W.2d at 4 (a police officer's testimony in murder prosecution that defendant had refused to take lie detector test was erroneous but did not warrant reversal in view of fact that trial court, after objection, admonished jury to disregard such testimony.). "[A]n admonition is presumed to cure a defect in testimony." *Major v. Commonwealth*, 275 S.W.3d 706, 716 (Ky.2009) (*quoting Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky.1993) *overruled on other grounds by Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky.1997)). Notably, the polygraph was not mentioned at any point following the admonition. Accordingly, the trial court's admonition was sufficient to cure the defect, if any, created by the Commonwealth's introduction of the interviews.

In sum, White was not deprived of her right to present a complete defense by the erroneous introduction of the police interviews. By virtue of the Commonwealth's misstep, the jury was permitted to hear that White voluntarily submitted to and passed a polygraph examination. The jury could not reasonably construe this evidence as creating an inference that White failed the polygraph examination. *Cf. Morgan*, 809 S.W.2d at 706. The trial court's decision to exclude any additional evidence of the polygraph results was in accordance with this Court's earlier decision which affirmed the exclusion of that evidence in White's first trial. As such, we find that the trial court did not abuse its discretion.

II. The Limitation of the Cross–Examination of the Medical Examiner Was Harmless.

Medical examiner Dr. Jennifer Schott performed the autopsy on Julie Burchett and testified at White's trial. Dr. Schott testified that Burchett suffered nine stab wounds to her torso that injured her heart, lungs, and diaphragm, causing her death. On cross-examination, White asked Dr. Schott to explain "what was found" in Burchett's system. The Commonwealth objected on the grounds that the laboratory analyst who prepared the toxicology report was the proper witness to answer that question, and that White had not listed the analyst as a witness or noticed her as an expert

pursuant to procedural rules. Therefore, according to the Commonwealth, the toxicology report was inadmissible.[3] White responded that toxicology report was a part of the medical examination process, and that only the defendant could object to a perceived violation of the defendant's right to confront a witness. The trial court sustained the objection, and defense counsel stated its intention to take testimony from Dr. Schott by avowal.

Dr. Schott's avowal testimony revealed that a multitude of drugs were present in Burchett's system at the time of her death. According to Dr. Schott's interpretation of the toxicology report, marijuana was not detected in Burchett's system. The laboratory analyst who prepared Burchett's toxicology report was not called to testify.

*4 White now argues that her right to present a full and complete defense was violated when the trial court declined to allow the medical examiner to testify about the results of the toxicology report. White maintains that the toxicology report was significant to her defense to the extent that it contradicted Jason Miller's testimony (that he had smoked marijuana with the victim earlier in the day) and called into question his ability to recall the events of that day.[4] The Commonwealth contends that the results of the toxicology report were not relevant to the medical examiner's expert opinion because the drugs in Burchett's system did not cause her death, and would serve only to besmirch the victim, running afoul of Kentucky Rule of Evidence ("KRE") 403's prohibition against unduly prejudicial evidence.

A criminal defendant's constitutional right to present a defense is a fundamental one, anchored by both the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).[5] A trial court's exclusion of evidence that "significantly undermine[s] [the] fundamental elements of the defendant's defense" will "almost invariably be declared unconstitutional." *Beaty v. Commonwealth*, 125 S.W.3d 196, 206–07 (Ky.2003) (internal quotations omitted).

Under the principles set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court has declared that the admission of a forensic laboratory report (like the toxicology report in the instant case) without the live testimony of the report's author is a violation of the defendant's right to confrontation. *Whittle v. Commonwealth*, 352 S.W.3d 898 (Ky.2011). As for our present case, White deliberately waived her right to confront the report's author when she questioned Dr. Schott about the results of the report, attempting to elicit evidence that she wanted the jury to hear. *See Parsons v. Commonwealth*, 144 S.W.3d 775 (Ky.2004) ("[A] criminal defendant may waive the constitutional right of confrontation."); *Illinois v. Allen*, 397 U.S. 337 (1970). The question presented here is whether under our evidentiary rules White was entitled to question the medical examiner about the results of the victim's toxicology examination.

The Commonwealth maintains that Dr. Schott could not testify about the results reflected on the report because the victim did not suffer a drug-related death. Therefore, according to the Commonwealth, Dr. Schott did not rely on the toxicology report in formulating her expert opinion. Pursuant to KRE 703(a), an expert witness may base his or her expert opinion on "facts or data ... made known to the expert at or before the hearing," which may include the types of evidence the expert normally uses in his or her field to formulate an opinion. *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky.1991). In *Baraka v. Commonwealth*, 194 S.W.3d 313, 315 (Ky.2006), a defendant objected to a medical examiner's opinion that was based in part on disputed information concerning the victim's death provided to her by the police. In rejecting the defendant's position, the *Baraka* Court concluded that the challenged information from law enforcement was "exactly the kind of information customarily relied upon in the day-to-day decisions attendant to a medical examiner's profession." 194 S.W.3d at 315.

*5 Here, Dr. Schott explained that she submitted blood, urine, and cerebral spinal fluid samples from Burchett to the medical examiner's office. She went on to describe her autopsy report and the toxicology report as "obviously related" and usually combined. As expressed in *Baraka*, "there is absolutely nothing improper about basing an expert opinion on facts and data ... made known to the expert at or before the hearing." *Id.* at 314–15 (internal quotations omitted). Because toxicology reports are typically relied upon by medical examiners to formulate opinions concerning the cause of an individual's death, Dr. Schott was properly subject to cross-examination under KRE 703(a) about the results of Burchett's toxicology screening.

Of course, evidence must first be relevant to be admissible, and the question of whether the results of the toxicology report were relevant is admittedly close. KRE 401; KRE 402. Jason Miller testified that he and a friend[6] spent several hours with Burchett on the day of her murder. He explained that he

purchased marijuana and smoked it. When asked if Burchett smoked marijuana with him, Miller replied: "I'm sure, I can't remember clearly who all smoked, but I'm sure." He testified that while at a party at White's mother's house later that evening, he witnessed White confront Burchett about an alleged affair between Burchett and White's boyfriend. According to Miller, Burchett became upset and started crying, retreating to a bathroom where she remained for ten to fifteen minutes. Miller testified that when Burchett reemerged, White stabbed her multiple times.

The impeachment value of the evidence here, *i.e.*, that Burchett did not smoke marijuana despite Miller's account to the contrary, appears attenuated at first blush. However, we are mindful that a witness's credibility is always at issue and evidence relevant to that issue generally should not be excluded. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997) (*citing Parsley v. Commonwealth*, 306 S.W.2d 284 (Ky.1957)). The absence of marijuana in the victim's system could only be revealed through the introduction of the toxicology report, and the trial court's limitation of White's cross-examination of Dr. Schott effectively excluded those results from evidence. Miller's testimony was directly at odds with White's defense that she was not at the party and did not stab Burchett, therefore we recognize some probative value in the results of the toxicology report. KRE 401. Furthermore, a limited inquiry as to the presence or absence of marijuana would safeguard against any undue prejudice implicit in the wholesale disclosure of the gamut of drugs[7] reflected in the report. *See Burton v. Commonwealth*, 300 S.W.3d 126 (Ky.2009) (admission of urinalysis evidence had the improper effect of branding the victim as a "drug user."). In short, we cannot perceive any great prejudice to the Commonwealth's case if White had been allowed to inquire about marijuana only.

However, even if the limitation on Dr. Schott's cross-examination constituted an abuse of discretion, the limitation was undoubtedly harmless. Beyond its narrow impeachment value as to Miller, we fail to recognize any significant relevance in the victim's non-use of marijuana. Moreover, Miller's testimony regarding the events at the party was largely corroborated by other eye-witnesses.[8] Law enforcement officers who encountered White on the night of the murder testified to observing blood stains on her shirt. A search of White's mother's house revealed blood stains beneath what appeared to be newly-laid flooring. Other witnesses testified to receiving phone calls from White where she allegedly conveyed details regarding the discovery of Burchett's body only known to the responding officers or someone who had moved the body. A deputy county jailer testified to witnessing an encounter between Miller and White where White threatened to "get even" with Miller. Also, a witness who was housed at the jail with White testified that White made multiple incriminating statements related to Burchett's murder, allegedly confessing to burning a bloody shirt and moving the body with the help of family members.

***6** The marginal probative value of the toxicology results notwithstanding, the trial court's limitation on White's cross-examination of the medical examiner did not "significantly undermine" a fundamental element of White's defense. *Beaty*, 125 S.W.3d at 206–07. White was given the opportunity to attack various aspects of the Commonwealth's case against her. In light of the Commonwealth's evidence, as well White's own theory of defense, Miller's account that Burchett smoked marijuana with him earlier in the day was not fundamental to her case. In sum, the limitation of the medical examiner's testimony did not infringe upon White's constitutional right to present a full and complete defense.

III. The Trial Court Did Not Err in Failing to Admonish the Jury W hen No Admonition Was Requested and No Manifest Injustice Resulted.

During the cross-examination of Detective Boyd, White asked a series of questions regarding the detective's interrogation tactics and training. White asked Detective Boyd how anyone would know if he was "misleading" with his responses considering that he was "trained" to mislead individuals in interrogation scenarios. The Commonwealth objected to the inference that Detective Boyd was lying on the stand, asserting that he "took an oath to tell the truth," but did not take the same oath prior to interrogating White. The trial court sustained the Commonwealth's objection. White now contends that the trial court erred when it failed to admonish the jury after the Commonwealth commented on Detective Boyd's truthfulness. White did not challenge the trial court's ruling on the objection, nor did she request an admonition following the objection. As such, the error is unpreserved. We will proceed with the palpable error standard of review as set forth in RCr 10.26:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court

> on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

We readily agree that no manifest injustice flowed from the Commonwealth's statement objecting to White's cross-examination of Detective Boyd. The reference that Detective Boyd "took an oath" to testify, but was under no such obligation during interrogations, did not improperly bolster the witness's credibility, nor was it inflammatory or devastating to White's defense. *See Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky.2003); *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky.2000) (no error where further admonition, which defendant did not request, would have cured inadmissible evidence). In fact, the statement only further elucidated White's argument that the investigators misled White during early interviews in order to elicit incriminating statements from her. Questions of witness credibility are resolved in the jury room. *Cross v. Clark*, 213 S.W.2d 443 (Ky.1948). The jury was entitled to draw conclusions regarding Detective Boyd's truthfulness based on the facts developed throughout his direct and cross-examination, and nothing in the prosecutor's remark impeded the jury's ability to weigh Detective Boyd's credibility. The trial court did not proceed erroneously on this point, much less palpably so.

CONCLUSION

In sum, White was fairly tried and sentenced. For the reasons stated herein, we affirm the judgment and sentence of the Wayne Circuit Court.

All sitting. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., concur.

Scott, J., concurs in part and dissents in part by separate opinion.

SCOTT, J., CONCURRING IN PART AND DISSENTING IN PART:

*7 Although I concur with the majority on the other issues, I must strongly dissent on Appellant not being allowed to introduce evidence to clarify that she did take and pass the polygraph referenced in the Commonwealth's proof. The Commonwealth "opened the door" here and it's only fair for Appellant to be allowed to fairly respond. What's sauce for the goose is sauce for the gander, too! Thus, I would reverse and order a new trial without any reference to the polygraph.

All Citations

Not Reported in S.W. Rptr., 2014 WL 7284295

Footnotes

1 Given this longstanding law and particularly in light of this Court's ruling in this *very case* in the prior appeal, it is unclear why the Commonwealth could not take the time to listen to and redact these two, relatively brief recorded statements before the jury heard them.

2 A narrow exception to the rule against polygraph results allows a defendant to bring evidence of a polygraph examination to "inform the jury as to the circumstances in which a confession was made." *Rogers v. Commonwealth*, 86 S.W.3d 29, 40 (Ky.2002). This rule allows the defendant, "and only the defendant," the opportunity to place relevant evidence in the form of a polygraph examination "as to the credibility of his confession before the fact-finder." *Id.*

3 During the bench conference, White noted that the toxicology report had been admitted during the first trial.

4 We reject the Commonwealth's claim that White's failure to argue before the trial court that the toxicology report would be used to impeach Miller's testimony rendered the argument unpreserved. White was under no obligation to disclose every element of her defense. KRS 500.070(2). The trial court's ruling limiting White's cross-examination of the medical examiner was sufficient to preserve the issue for our review.

5 "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment[.]" *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984).

6 Miller testified that Seth Frost spent the day and evening with Miller and Burchett, the victim. On direct examination, Frost denied ever meeting Burchett, attending a party with Miller, or seeing any of the other witnesses on the night in question.

7 On avowal, Dr. Schott testified that Burchett's blood tested positive for methamphetamine and diazepam. She stated that Burchett's urine tested positive for amphetamine, methamphetamine, hydrocodone, and oxycodone. Burchett's spinal fluid tested positive for benzodiazepines.

8 Adam Manning testified that he was also at the party with his friend, Scotty Stanton, on the night of the murder. Manning stated that he observed White and another woman shouting at one another, with White ultimately pulling a knife from underneath her shirt. He testified that he saw blood as the women grappled. Manning left the party with Stanton when he saw blood. Scotty Stanton testified that he observed two women fighting, but could not recall seeing a knife or blood.

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TO BE PUBLISHED
Court of Appeals of Kentucky.

Hope WHITE, Appellant
v.
COMMONWEALTH of Kentucky, Appellee

NO. 2021-CA-1204-MR
|
December 22, 2022; 10:00 A.M.
|
Discretionary Review Denied
by Supreme Court June 7, 2023

Synopsis
Background: Defendant, who was twice convicted of murder, in which the second conviction was affirmed on appeal, 2011 WL 6826230 and 2014 WL 7284295, moved for release of physical evidence held by the Commonwealth for forensic testing. The Circuit Court, 57th Circuit, Wayne County, Vernon Miniard, Jr., J., denied the motion. Defendant appealed.

Holdings: The Court of Appeals, Jones, J., held that:

DNA testing of cigarette lighter could, at best, produce mere speculation as to connection to murder case;

retesting of murder victim's fingernail scrapings was not permitted under statute governing postconviction DNA testing;

DNA testing of hair evidence found in murder victim's stab wound and on victim's tank top could not exclude defendant as perpetrator of murder;

DNA testing of grey sweatshirt, which had bloodstains and hair on it, could not exclude defendant as perpetrator; and

the Circuit Court was not required to review cumulative impact of evidence when deciding defendant's motion.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

APPEAL FROM WAYNE CIRCUIT COURT, HONORABLE VERNON MINIARD, JR., JUDGE, ACTION NO. 09-CR-00079

Attorneys and Law Firms

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BRIEF FOR APPELLEE: Daniel Cameron, Attorney General of Kentucky, Harrison Gray Kilgore, Frankfort, Kentucky.

ORAL ARGUMENT FOR APPELLEE: Harrison Kilgore, Matthew Kuhn, Frankfort, Kentucky.

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

OPINION

JONES, JUDGE:

*1 Hope White appeals from the Wayne Circuit Court's order denying her motion to release evidence for forensic testing pursuant to KRS [1] 422.285. After our review of the facts and applicable law, we affirm.

I. BACKGROUND

At approximately midnight on July 19, 2008, police discovered Julie Burchett's lifeless body in the passenger seat of her vehicle at an abandoned pallet mill in Monticello, Kentucky. Burchett had been stabbed to death. From the position of the body, investigators concluded Burchett had been killed elsewhere and then moved to the pallet mill.

Police learned that on the day Burchett was stabbed, White had been told that her boyfriend, Bobby Buster, had been having an affair with Burchett. That evening, witnesses placed White, Buster, Burchett, and several others at a party being held at White's mother's house. One witness, Jason Miller, described seeing White confront Burchett about the affair after which Burchett retreated to the bathroom. Miller testified that after Burchett emerged from the bathroom White stabbed her with a knife.

White was indicted for murder on August 18, 2009. At her trial, the jury convicted White of murder and fixed her sentence at thirty years' imprisonment. White appealed to the Kentucky Supreme Court as a matter of right.[2] After its review, the Supreme Court reversed and remanded for a new trial because the trial court had erroneously "denied [White's] request for an instruction on first-degree manslaughter[.]" *White v. Commonwealth*, No. 2010-SC-000626-MR, 2011 WL 6826230, at *1 (Ky. Dec. 22, 2011). In her second trial, a jury once more convicted White of murder, this time sentencing her to twenty-five years. The Kentucky Supreme Court affirmed this conviction and sentence on appeal. *White v. Commonwealth*, No. 2013-SC-000321-MR, 2014 WL 7284295 (Ky. Dec. 18, 2014).

On February 5, 2021, through Kentucky Innocence Project counsel, White moved the trial court to grant the release of physical evidence held by the Commonwealth for forensic testing as authorized by KRS 422.285. White specifically requested DNA testing for the following items: (1) the victim's fingernail scrapings; (2) a cigarette lighter discovered on the ground outside the victim's vehicle at the pallet mill; (3) a cut hair which was found in a stab wound in the victim's right breast; (4) a hair which was found on the tank top worn by the victim; (5) a grey sweatshirt, found at the pallet mill, which had bloodstains on it; and (6) a hair found on the same grey sweatshirt. Among other things, White argued that forensic testing had advanced to the point at which the hair evidence could now be tested for DNA, which was not available at the time of her trial. White also argued the earlier results from a test of the fingernail scrapings, presented to the jury as having no foreign DNA, were actually inconclusive and warranted a second test. Finally, White contended that the results of the DNA testing, if exculpatory, would indicate a reasonable probability that she would not have been prosecuted or convicted at trial.

*2 In its response to the motion, the Commonwealth disagreed, arguing that the results from the hair evidence could not be exculpatory and that the fingernail scrapings had already been tested. Furthermore, the Commonwealth argued the grey sweatshirt and lighter were unlikely to be related to the case because they were discovered at a public location.

After briefing on the issue, the trial court entered an order on September 20, 2021, which denied the motion for DNA testing. Applying KRS 422.285, the trial court determined that the hair evidence "would not, with a reasonable probability, either exonerate [White], lead to a more favorable verdict or sentence, or otherwise be exculpatory." (Record (R.) at 954.) The trial court explained that, even assuming the hair belonged to someone other than White or Burchett, it would not exonerate White because there was no way to tell when the hair was deposited – the presence of the hair merely indicated that Burchett "was around other people in the course of the day, which was already clear from the trial testimony." (R. at 956.) With regard to the grey sweatshirt and the lighter, the trial court determined their value to the case was speculative at best due to being discovered at the pallet mill, a public location with significant foot traffic. Finally, the trial court found that the fingernail scrapings had already been tested and, contrary to White's assertions, the results were not inconclusive. Ultimately, the trial court denied the motion, ruling as follows:

> [N]one of the DNA testing requested would change anything. Nothing sought by the defendant can exclude her from the crime scene or have any bearing on the jury's verdict. In each of the 6 instances, simply because someone else's DNA may be present does not exclude the defendant from the crime, especially when the defendant was not convicted based on scientific evidence.

(R. at 960.) This appeal followed.

II. ANALYSIS

Kentucky's postconviction DNA testing statute, KRS 422.285, applies to those who have been convicted of capital offenses, Class A and B felonies, and violent offenses as designated in KRS 439.3401. KRS 422.285(1). The statute

contains both mandatory and permissive provisions under KRS 422.285(5) and (6), respectively. Under KRS 422.285(5)(a), "the court *shall* order DNA testing and analysis if the court finds ... reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis[.]" (Emphasis added.) In contrast, the permissive provision of the statute reads as follows:

> After due consideration of the request and any supplements and responses thereto, the court *may* order DNA testing and analysis if the court finds that all of the following apply:
>
> (a) A reasonable probability exists that either:
>
> 1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or
>
> 2. DNA testing and analysis will produce exculpatory evidence[.]

KRS 422.285(6)(a)1.-2. (Emphasis added.)

Aside from provision (a), KRS 422.285(5) and (6) contain nearly identical language[3] on the additional requirements for a court to grant a motion for DNA testing:

> (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted;
>
> ***3** (c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis;
>
> (d) Except for a petitioner sentenced to death, the petitioner was convicted of the offense after a trial or after entering an Alford[4] plea;
>
> (e) Except for a petitioner sentenced to death, the testing is not sought for touch DNA, meaning casual or limited contact DNA; and
>
> (f) The petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates.

KRS 422.285(5).

In a previous opinion, this Court held that relief under KRS 422.285 requires the trial court to confirm whether "(1) the petition (and supplements and response), (2) the petitioner, and (3) the evidence ... each meets the requirements of the statute." *Owens v. Commonwealth*, 512 S.W.3d 1, 7 (Ky. App. 2017). It is only after addressing these steps that the trial court may reach the final step, "the more substantive and ultimate question – is there a reasonable probability that the DNA evidence the petitioner seeks would have made a difference had it been available at or before trial?" *Id.*

This "ultimate question," as evaluated by our Supreme Court, is whether "the evidence sought would either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory." *Bowling v. Commonwealth*, 357 S.W.3d 462, 468 (Ky. 2010), *as modified on denial of reh'g* (Mar. 24, 2011). The trial court's "reasonable probability" analysis must operate under the assumption that the evidence will be "favorable to the movant." *Id.* However, "[t]his assumption does not mean that the movant gets a free pass simply because he can allege that the evidence will be helpful." *Id.* The movant must show how the evidence would result in exoneration, a more favorable sentence, or exculpation. *Id.* "In the exercise of sound discretion, the trial court must then make the call whether such reasonable probability exists, looking to whether such evidence would probably result in a different verdict or sentence." *Id.* With these principles in mind, we must examine the trial court's decision as applied to each of the pieces of evidence requested for DNA testing.

First, White requested DNA testing of the cigarette lighter found at the pallet mill outside Burchett's vehicle. The trial court declined to order testing because the lighter's connection to the case was tenuous at best. "There is nothing showing when the lighter was placed at the pallet mill, how long it had been there or anything about it." (R. at 958.) We agree. "The trial court properly excluded testing of DNA that at best could produce mere speculation." *Bowling*, 357 S.W.3d at 469.

Second, White requested DNA testing of the victim's fingernail scrapings, despite the fact that those scrapings were tested previously. In the Kentucky State Police forensic laboratory report dated June 10, 2010, the test of the fingernail scrapings indicated "no DNA foreign to Julie Burchett" was found. (R. at 224.) However, the report also noted an inconclusive result attributed to "stutter" at one of the tested loci which was not reproducible.[5] As support, White points

to the laboratory technician's notes, which posited "possible high stutter and / or additional DNA." (R. at 761.) The trial court denied the motion to retest the scrapings on grounds that only one of the fifteen tested loci indicated stutter, and the final report was not inconclusive or exculpatory.

*4 Despite White's assertions to the contrary, the final laboratory report conclusively determined no foreign DNA was found in the fingernail scrapings. The statute specifically requires that "[t]he evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis[.]" KRS 422.285(5)(c). The Supreme Court explained it in this way:

> Finally, this evidence must not have been previously tested for DNA, or if it was tested, the movant must show that the type of testing now being requested is qualitatively different and "may resolve an issue not previously resolved by the previous testing and analysis." KRS 422.285[(5)](c) & [(6)](c). By this language, the legislature made clear its intent not to have successive, redundant DNA testing requests, and placed a high burden on a movant to establish that an entirely new issue is involved. Otherwise, DNA testing, sometimes many years after trial, is limited to the "one bite of the apple" rule.

Bowling, 357 S.W.3d at 468. The laboratory report indicates that there was a stutter in testing that could not be reproduced, and this is not enough to disturb the report's ultimate conclusion that the scrapings lacked foreign DNA. Furthermore, KRS 422.285(5)(c) and (6)(c) do not permit successive testing. We discern no abuse of discretion in the trial court's denial of White's request to retest the fingernail scrapings.

The next three of the six items requested for testing involved hair: the cut hair found in the victim's stab wound, the hair found on the victim's tank top, and the hair found on the grey sweatshirt. Based on existing precedents, it is immediately apparent that hair evidence rarely qualifies for DNA testing under the statute because the result generally will not exclude a defendant. "[E]ven with an alternate perpetrator theory, the presence of someone else's DNA [will] not necessarily be exculpatory." 357 S.W.3d at 469. Because hair is easily and readily shed in the course of day-to-day activities, and there is, as of yet, no way to determine *when* a hair was deposited in any particular instance, it tends to have minimal exclusionary value.

In *Hodge v. Commonwealth*, 610 S.W.3d 227 (Ky. 2020), the Supreme Court, quoting the Sixth Circuit, pointed out that the hairs of a third party found at a crime scene could not exonerate Hodge because "the results of the new DNA testing cannot exclude Hodge from the crime scene." *Id.* at 230 (quoting *Hodge v. Haeberlin*, 579 F.3d 627, 636 (6th Cir. 2009)). Similarly, in *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012), the Supreme Court ruled that testing hair found inside a vehicle would not be exculpatory because it could not exclude the presence of the defendant from inside the vehicle; "[a]t most, it would only show that other people had been inside the car[.]" *Id.* at 190.

One of the rare contrasting instances of valuable hair evidence may be found in *Hardin v. Commonwealth*, 396 S.W.3d 909 (Ky. 2013). In that case, the Kentucky Supreme Court considered the hair evidence potentially exculpatory because the victim "was killed following a violent close-range struggle" and "the unidentified hairs [were] *found in the victim's hand*[.]" *Id.* at 915 (emphasis added). Context is everything. In *Hardin*, there was a discernible link between the hair evidence and an alternate perpetrator which could exclude the defendant. The *Hardin* Court considered the evidence to be similar to *Bedingfield v. Commonwealth*, 260 S.W.3d 805 (Ky. 2008), in which semen collected from the victim in a rape case, when subjected to later testing, did not match the DNA of the defendant. The Supreme Court found this newly discovered DNA evidence was substantive and exculpatory and, even though not clearly an exoneration, warranted a new trial. *Id.* at 814-15.

*5 Here, the trial court relied on *Hodge* and *Bowling* to determine that DNA testing of the hair evidence in this case could not exclude White as the perpetrator. Taking the most exculpatory outcome possible from testing, that the hair belonged to a third party and not the victim or White, the trial court reasonably determined that there was no indication of *when* the hair was deposited, and that the cut hair found in the victim's stab wound was likely on her shirt at the time she was stabbed. Even if DNA testing found the hair in the stab wound and the hair on her shirt belonged to third parties, the testimony in the case suggested that Burchett was around multiple people on the day of her stabbing, including her attendance at a party hosted at White's mother's home. While the hair could have come from Burchett's killer, it is equally likely she could have picked the hair up during a benign encounter earlier that day. As such, White's exclusion as the source of the hair would not be exculpatory. The trial court's

analysis on this point was sound and we do not appreciate any abuse of discretion with respect to its denial of DNA testing as to these two pieces of hair evidence.

The trial court's approach to the grey sweatshirt, as well as the hair fiber found on that article of clothing, presents more difficult questions. The trial court took the view that the sweatshirt was found in the pallet mill, a public area, and so its connection to the case was speculative. We cannot be as sanguine as the trial court because the grey sweatshirt tested positive for blood which was "too limited for further analysis" at the time. (R. at 452-53.) Furthermore, although we agree that the grey sweatshirt was found in a public area, we cannot ignore the reasonable inference that a bloodied article of clothing found near the body of a stabbing victim may have something to do with the crime. Taking the most favorable assumption to the movant of what DNA testing might uncover, it is entirely plausible that testing would reveal the blood belonged to Burchett, and additional DNA on the sweatshirt, or on the hair fiber found on the sweatshirt, might indicate the involvement of a third party.

However, even though testing might reveal the DNA of a third person on the grey sweatshirt, precedent requires us to conclude that this is not sufficient to mandate testing under KRS 422.285. In *Moore v. Commonwealth*, 357 S.W.3d 470 (Ky. 2011), the Kentucky Supreme Court determined that it was not favorable enough to the defendant to show that another person's DNA was found on clothing worn by the murderer. "Though the tests demonstrated the presence of another person's DNA, they did not exclude his DNA." *Id.* at 487 (footnote omitted).

We must consider the DNA evidence in light of the evidence at trial, during which numerous fact witnesses testified to White's involvement. Jason Miller testified that White stabbed Burchett multiple times at the party; a witness who was housed at the jail with White testified that White made multiple incriminating statements related to Burchett's murder, allegedly confessing to burning a bloody shirt and moving the body with the help of family members; law enforcement officers who encountered White on the night of the murder testified to observing blood stains on her shirt and to finding blood stains under a newly laid floor at White's mother's home where Miller testified he saw White stab Burchett; and other witnesses testified to receiving phone calls from White where she allegedly conveyed details regarding the discovery of Burchett's body only known to the responding officers or someone who had moved the body.

Applying *Moore* to the present case, even if the blood on the sweatshirt was found to be Burchett's, and even if the additional DNA found on the sweatshirt or the hair fiber belonged to a third party, it "would not necessarily be exculpatory." *Id.* (quoting *Bowling*, 357 S.W.3d at 469). In fact, it would be entirely consistent with the evidence at trial indicating that various family members assisted White in disposing of Burchett's body. Thus, while such evidence might inculpate a third party – by moving the body, for example – it would not necessarily exclude White's involvement in the murder.

***6** Finally, White urges us to view the trial court's failure to review the cumulative impact of the evidence she requested to be tested. Although she correctly cites *Moore* for the proposition that a trial court may make separate "findings as to specific items of evidence," 357 S.W.3d at 496, she cites no precedent which requires an analysis of the cumulative potential impact of the testing. *Moore* left the decision up to the "sound discretion of the trial court[,]" *id.*, as do we. Additionally, even if the evidence is viewed cumulatively, we cannot agree that it would be exculpatory. Given the fact witness testimony, we cannot agree that even if the other DNA evidence uniformly implicated another person that it would exculpate White. At best, the evidence would only assist in identifying other individuals who may have been involved in helping White dispose of the victim's body.

III. CONCLUSION

For the foregoing reasons, we affirm the Wayne Circuit Court's order denying White's motion for DNA testing pursuant to KRS 422.285.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2022 WL 17839301

Footnotes

1 Kentucky Revised Statutes.

2 "Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court." KY. CONST. § 110(2)(b).

3 We note here that the sole distinction between KRS 422.285(5)(b)-(f) and KRS 422.285(6)(b)-(f) appears to be an extra "that" found in KRS 422.285(6)(c). This extraneous word is not material for our analysis herein.

4 *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

5 'Stutter' is the name for the product of a 'mistake' in the [polymerase chain reaction] PCR process: that is, when the DNA strand being copied during PCR slips and bulges, and therefore appears to be a DNA peak on a printed electropherogram to be interpreted by an analyst. Stutter is an artifact, not a real piece of DNA, although it looks like a piece of DNA (a peak on an electropherogram). Stutter is a well-known phenomenon even in conventional DNA testing and is usually recognized in routine testing because it is only a certain percentage of height of the real piece of DNA next to it. Stutter phenomena, however, are problematic with [low copy number] LCN testing because the height of stutter increases proportionally to a true allele (real piece of DNA) and is therefore difficult to identify as an artifact as opposed to a real allele.

United States v. Wilbern, 17-cr-6017 CJS, 2019 WL 5204829, at *11 (W.D.N.Y. Oct. 16, 2019), *aff'd*, 20-3494-CR, 2022 WL 10225144 (2d Cir. Oct. 18, 2022).

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Supreme Court of Kentucky

2023-SC-0032-D
(2021-CA-1204)

HOPE WHITE — MOVANT

V.

WAYNE CIRCUIT COURT
09-CR-00079

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED: June 7, 2023.

CHIEF JUSTICE

COMMONWEALTH OF KENTUCKY
57TH JUDICIAL CIRCUIT
WAYNE CIRCUIT COURT
INDICTMENT NO. 09–CR-00079

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS. **ORDER DENYING MOTION FOR DNA TESTING**

HOPE WHITE **DEFENDANT**

****

This matter is before the Court on the defendant's Motion to Release Evidence for testing. The defendant seeks the release of 6 items of evidence for DNA testing of the item. The defendant's Motion is brought under K.R.S. 422.285. The Court having reviewed the record, reviewed the written submissions and being otherwise sufficiently advised makes the following findings of fact and adjudications of law:

The defendant's Motion implicates K.R.S. 422.285 for the grounds for the relief sought. The provisions most applicable to the Motion are subsections 5 and 6. K.R.S. 422.285(5) states:

> (5) After due consideration of the request and any supplements and responses thereto, the court shall order DNA testing and analysis if the court finds that all of the following apply:
>
> (a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;
>
> (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted;
>
> (c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis;
>
> (d) Except for a petitioner sentenced to death, the petitioner was convicted of the offense after a trial or after entering an Alford plea;
>
> (e) Except for a petitioner sentenced to death, the testing is not sought for touch DNA, meaning casual or limited contact DNA; and

(f) The petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates.

The provisions of K.R.S. 422.285(5) are mandatory if, and only if, all of the provisions enumerated are met.

K.R.S. 422.285(6) states:

(6) After due consideration of the request and any supplements and responses thereto, the court may order DNA testing and analysis if the court finds that all of the following apply:

(a) A reasonable probability exists that either: 1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or 2. DNA testing and analysis will produce exculpatory evidence;

(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted;

(c) The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis;

(d) Except for a petitioner sentenced to death, the petitioner was convicted of the offense after a trial or after entering an Alford plea;

(e) Except for a petitioner sentenced to death, the testing is not sought for touch DNA, meaning casual or limited contact DNA; and

(f) The petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates.

K.R.S. 422.285(6) is permissive in that the Court may order testing, if and only if, all the provisions following are met. In the case before the Court, the defendant cannot meet the threshold requirement that "the evidence sought would either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory." Bowling v. Commonwealth, 357 S.W.3d 462, 467-468 (Ky. 2010).

"The first level of proof the movant must make in support of the DNA testing request, under either section (2) or (3) of the statute, is that the evidence sought would either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory." Id. The Court must look at the request based on a "reasonable probability" standard. The analysis involves the assumption that the evidence will be favorable to the defendant. Id. However, the assumption does NOT mean that the elements of the statute are met simply because the evidence will be helpful. The Court, using sound discretion, must then undertake to determine whether a "reasonable probability" exists that the new evidence "would probably result in a different verdict or sentence." Id.

The Court notes, as did the Commonwealth, that the defendant's Motion undertakes a very lengthy series of criticisms about the defendant's perceived errors in the investigation, polygraph, witness statements, police interviews, and trial testimony of various witnesses in an attempt to cast doubt on the investigation and to add weight to the possible results of the DNA testing requested. Much of the criticism is focused on issues other than the requested DNA testing and bear no weight in the Court's analysis of that issue. However, as the Commonwealth pointed out, the Motion ignores the fact that all of the criticisms leveled were heard and rejected by two juries and/or by the Kentucky Supreme Court. That said, the Court will address the items requested in the order they appear in the defendant's Motion:

1. **The cut hair found in the victim's right breast stab wound.**

The Court finds as a matter of factual analysis and law that DNA testing on this hair would not, with a reasonable probability, either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory. As such, the cut hair would not, with a reasonable probability, cause the defendant to have not been prosecuted or convicted if exculpatory results had been obtained. K.R.S. 422.285(5).

The cut hair found in the victim's right breast stab wound will belong to either Julie Burchett, the defendant or some other person. It was stuck on Julie's shirt, presumably at the time she was stabbed, causing it to be cut. There is no way to ascertain when the hair was deposited on her shirt. There is ample evidence in the record indicating that Julie was with several persons through the course of the day, including the defendant. In Hodge v. Commonwealth, 610 S.W.3d 227 (Ky. 2020), the Kentucky Supreme Court was tasked with deciding whether the Circuit Court's Order denying Hodge's Motion for DNA Testing was in error. The facts of Hodge are similar to facts here. Hodge requested testing of 7 hairs found at the crime scene which did not match the known hair standards of the victims. He argued that if the hairs matched Donald Bartley it would undermine Bartley's credibility creating a probability that either the verdict or sentence would have been more favorable. The Court rejected that argument noting that even if the hairs matched Bartley, that would not exonerate Hodge. It would not mean Hodge was not also inside the home where the crime occurred. "As stated earlier, testimony that others were present inside the residence or assisted him in committing the crimes would not have influenced the jury to find him not guilty." Id.

In this case, there is significant evidence that other people were in the home where Julie was stabbed. It stands to reason that it is very possible that the hair may belong to one of the people who were there and observed the crime. The fact that one of the witnesses hair may be found in the right breast stab wound does not exonerate the defendant.

In addition, there is no way to determine when the hair was deposited on the victim. "[W]ithout being able to precisely pinpoint when the DNA was deposited, it would prove nothing." Bowling at 469. "Much like the DNA in the car, however, even if someone else's DNA was found on the jacket, this would not exonerate Appellant, and even with an alternative perpetrator theory, the presence of someone else's DNA would not necessarily be exculpatory.

Id.

Much like Bowling, in this case there is significant evidence that the victim was with and around several people during the course of the day she was stabbed. Even the defendant's Motion outlines the numerous people she was with through the course of the day. Even assuming the the hair belongs to someone else, that does not change anything. And it certainly does not mean she was not with the defendant that day, and it does not mean that the defendant did not stab Julie. It does not either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory.

2. The single hair found on the victim's tank top that was identified as dissimilar in microscopic characteristics.

The Court finds as a matter of factual analysis and law that DNA testing on this hair would not, with a reasonable probability, either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory. The analysis of this hair is no different than the hair found in the stab wound. Assuming the hair found on the tank top belongs to someone other than the victim or the defendant, it still does not exonerate the defendant or show it would have influenced the jury to find her not guilty. If the hair belongs to someone else, it just means that the victim was around other people in the course of the day, which was already clear from the trial testimony. This was a known fact at both trials. The jury was well aware that Julie had been around numerous other people during the day. In Hodge, the Supreme Court noted at least twice that any evidence of another person inside the residence that was the scene of the crime did NOT show that Hodge was not also inside the residence or commit the crimes. They stated that, "the results of new DNA testing cannot exclude Hodge from the crime scene." Id.

Similarly, the fact that Julie was in the presence of other persons that day cannot exclude the defendant from also being around Julie that night. It would not, with a reasonable probability,

either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory.

3. The grey sweatshirt.

The Court finds as a matter of factual analysis and law that DNA testing on the grey sweatshirt would not, with a reasonable probability, either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory. Based on the tenuous connection between the sweatshirt and the crime scene (Tammy White's house), the Court believes the sweatshirt is even less relevant than the hairs found on the victim's person.

The pallet mill where the sweatshirt was found is a significant distance from the crime scene. In fact, the pallet mill is very close to town, in a public area. Evidence indicates that people are through there frequently. The only connection to the crime is that the sweatshirt was found at the pallet mill, a public place with significant amounts of foot traffic through. That is the only connection. There is no way to know when the sweatshirt was left at the pallet mill, whose it was or if it is even related to this case at all aside from being at the pallet mill where the car was found. There is nothing linking the sweatshirt to Julie or any of the persons she was around that day. The Court finds that it is speculative, at best, to suggest that the sweatshirt has anything to do with this case. "The trial court properly excluded testing of DNA that at best could produce mere speculation." Bowling at 469.

Even if it is assumed that the sweatshirt is somehow related, "the age of any DNA found could not be established sufficiently to determine when it was deposited . . ." on the sweatshirt. Bowling at 469. It would not, with a reasonable probability, either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory.

4. The hair identified on the grey sweatshirt.

Like the sweatshirt itself, the hair on the sweatshirt is related to this case only in that it

was found at the pallet mill where the victim's car and body were found. Besides the locational link, there is no other link to the hair. Based on its location in a public place, the hair could have been there for days or weeks. There is no way to tell. Thus, there is no way to determine the age of the DNA on the hair, the age of the hair, or how it got there.

Even assuming that the hair does not match the victim or the defendant, finding someone else's DNA on the hair, which was found in a public place that was not the actual crime scene does not exclude the defendant from being present at the actual crime scene. It would not, with a reasonable probability, either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory. "The trial court properly excluded testing of DNA that at best could produce mere speculation." Bowling at 469. The results of DNA testing on this particular item of evidence cannot exclude the defendant from the crime scene at Tammy White's house. Hodge, supra.

5. The lighter found outside the vehicle.

The Court finds as a matter of factual analysis and law that DNA testing on the grey sweatshirt would not, with a reasonable probability, either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory. The lighter found outside the victim's vehicle has the same tenuous connection to the case as the sweatshirt. There is nothing showing when the lighter was placed at the pallet mill, how long it had been there or anything about it.

Even assuming DNA found on the lighter belongs to someone other than the victim or the defendant, that evidence would not change the outcome of the trial. Finding someone else's DNA on a lighter that was found in a public place that was not the actual crime scene does not exclude the defendant from being present at the actual crime scene. It would not, with a reasonable probability, either exonerate the defendant, lead to a more favorable verdict or

sentence, or otherwise be exculpatory. "The trial court properly excluded testing of DNA that at best could produce mere speculation." Bowling at 469. "[W]ithout being able to precisely pinpoint when the DNA was deposited, it would prove nothing." Bowling at 469. "Much like the DNA in the car, however, even if someone else's DNA was found on the jacket, this would not exonerate Appellant, and even with an alternative perpetrator theory, the presence of someone else's DNA would not necessarily be exculpatory. Id. The same holds true here.

6. The fingernail scrapings of the victim.

The Court finds that the fingernail scrapings were already tested. Despite the defendant's assertion to the contrary, the testing was not inconclusive. The official report from the KSP lab, the one that was testified to and entered into evidence, shows that no DNA foreign to Julie Burchett was found on the fingernail scrapings from Julie's right hand.

On the left hand, no DNA foreign to Julie was found. There was stutter noted in the report. The defendant's misplaced assertion about why that exonerates the defendant totally ignores the fact that there were at least 15 loci tested and the stutter related to only 1 of the 15. While the initial entry in the lab notes or log indicate "possible stutter and/or additional dna" the final report indicates stutter. That indication is only at one locus and was ultimately reported as stutter. The report is the official results of the testing by the lab. That it was ultimately reported as stutter does not make the test inconclusive or exculpatory.

As noted above, two separate juries heard about all of the issues raised in the defendant's motion relating to the witnesses, investigation and other complaints. After hearing all the evidence for both sides, two separate juries still determined that the defendant murdered Julie Burchett. As was the situation in Peak v. Commonwealth, 482 S.W.3d 409 (Ky.App. 2015), like this case, the conviction did not turn on DNA evidence, but rather on the eyewitness testimony of others, including a person to whom the defendant confessed. In Peak, "[t]he basis for his

conviction was the testimony of his co-conspirators, who indicated that Peak had been the one to kill the victim. Comparing DNA evidence from the scene of the crime with the now identified victim's DNA is highly unlikely to benefit Peak or change the outcome of his conviction and sentence." Similarly, as noted above, none of the DNA testing requested would change anything. Nothing sought by the defendant can exclude her from the crime scene or have any bearing on the jury's verdict. In each of the 6 instances, simply because someone else's DNA may be present does not exclude the defendant from the crime, especially when the defendant was not convicted based on scientific evidence.

Wilson v. Commonwealth, 381 S.W.3d 180 (Ky. 2012) is similar to Peak and this case. There, at the time of trial, DNA testing was not available. Wilson was convicted based on trial testimony from various witnesses. Like Bowling, Wilson requestd DNA testing of several hairs found in a vehicle, he alleged would be exculpatory. The Supreme Court noted that there was substantial evidence to convict Wilson of murder and various other offenses. The Court also found it important that Wilson confessed his involvement in the murder and rape to his cellmate, as is the case here. Weighing all of the evidence, including the confession, the Court held that the trial court did not abuse its discretion when it found that there was no reasonable probability that a favorable DNA testing result would exonerate Wilson, lead to a more favorable verdict or sentence or otherwise be exculpatory. "Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt." Bowling at 469.

Based on the foregoing, **IT IS ORDERED** that the defendant's Motion to Release Evidence for Testing is **DENIED.**

SO ORDERED this the 20 day of September 2021.

This is a final and appealable Order. There is no just cause for delay.

Hon. Vernon Miniard, Jr.
Judge, Wayne Circuit Court

Distribution to:

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