

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-002369-MR

DAVID W. MILLS

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
ACTION NO. 06-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,<sup>1</sup>  
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: David W. Mills appeals from a judgment of  
the Monroe Circuit Court entered on October 17, 2007, that sentenced him to 15  
years in prison after a jury found him guilty of manslaughter in the second degree

---

<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

and other charges stemming from an automobile accident. He argues that the trial court erred in admitting into evidence photographs of the accident scene that showed the body of the victim, in refusing to allow his expert witness to introduce a photograph of a vehicle of the same year and model as that which Mills was driving, and in refusing to grant his motion for a directed verdict. We affirm.

Mills was charged with having stolen a green 1996 Ford Taurus while its owner, Valerie Copas, was attending a revival meeting at her church. The theft occurred on July 25, 2006. In early September, Copas was informed that the car had been involved in an accident. She identified it and stated that its value was \$2500.

The accident that led to the charges against Mills occurred on September 3, 2006. Mills spent the night of September 1, 2006, at the home of Ginny Piercy, with whom he had a romantic relationship. The next day, Mills attended the Watermelon Festival with another female friend, Kelly Hammer. They were later joined by Mills's mother, who dropped Mills off at Piercy's house at around 10:45 p.m. that evening.

Piercy was irritated that Mills had spent the afternoon with Kelly Hammer. At his trial, she testified that when he arrived at her house, he was drunk, "staggering" and "obnoxious," and carrying three beers. Other witnesses who were present at Piercy's home that night testified that they did not know if Mills was drunk or not. About 30 or 45 minutes after Mills arrived at Piercy's house, she told him to leave.

At around 2:00 a.m. Mills arrived at the apartment of Judy Anderson. She testified that he stayed for about 15 minutes. She was not sure if he was driving or if he left on foot. According to Anderson, Mills was not drunk and did not smell of alcohol. Anderson's apartment is not far from Mill Creek Road, where the fatal accident occurred.

Terry Kelsay was helping David Huff deliver newspapers early in the morning on September 3, 2006. The men were traveling in Huff's red 2001 Cavalier; Huff was driving and Kelsay was in the front passenger seat. The men had just finished delivering papers on Mill Creek Road and were 30 or 40 feet from turning onto a shortcut that would take them to Celina Road when Kelsay noticed a car coming around a curve at a high rate of speed. Kelsay stated that the approaching vehicle, a Ford Taurus, was on the wrong side of the road when the two cars collided.

Several nearby residents came to offer assistance when they heard the crash. Anna Scott testified that she knew Mills and recognized him as the driver of the Ford Taurus. She and a friend helped Mills get out of the car and tried to get him to sit down. Scott stated that Mills was stumbling around. She did not know if it was because he was hurt or had been drinking, but she did not think that she smelled alcohol on him. James Smith, who pulled Mills out of the car, testified that Mills was limping but that he did not appear drunk and did not smell of alcohol. Smith testified that after he and Mills went to Huff's car, Mills asked if everyone was all right and then left the scene. The Allen County E.M.S. and the

Kentucky State Police arrived as Mills was leaving. At 3:39 a.m., the Deputy Coroner pronounced Huff dead from multiple injuries caused by the accident.

Kentucky State Police Trooper Michael Dubree later found a cell phone in the green Taurus that contained a contact saved as “mom.” Trooper Dubree checked the number and found that it belonged to Joyce Mills, Mills’s mother. Mills was arrested on September 5, 2006, at a trailer behind his mother’s house. He was taken to the emergency room at the Monroe County Medical Center and examined by Lori Petett. She testified that Mills came in with abrasions, cuts, and scrapes over his body and that he smelled of alcohol (he had been drinking a beer at the time of his arrest). Mills told Petett that he had been involved in a motor vehicle accident two days before and was seeking treatment.

Trooper Dubree interviewed Mills at the hospital. Mills admitted that he had stolen the Taurus. He also told the trooper that he had been drinking earlier on the day of the accident, consuming approximately six beers, but that he had not been drinking on the night of the accident. Mills admitted that he was involved in the accident and that because he was shaken up, he fled the scene when he heard sirens. According to Mills, Huff was backing out of a driveway into the road when the accident occurred. Mills was indicted on the charges of murder by use of motor vehicle, leaving the scene of an accident, theft by unlawful taking or disposition, assault in the second degree, and operating a motor vehicle while under the influence of alcohol or other substance.

At trial, the Commonwealth's accident reconstruction expert, Kentucky State Police Trooper Toby Young, testified that, in his opinion, Mills had failed to yield the right of way to Huff's vehicle by being in Huff's lane of travel at the time of the accident. Trooper Young based his opinion on gouge marks he observed on the roadway that were 8.3 feet over the center line in Huff's lane of travel.

Dr. John Hutchinson testified as an accident reconstruction expert for the defense. According to Hutchinson, Huff caused the accident by crossing into Mills's lane of travel. Hutchinson based his opinion on what he described as a "chop mark" in the road about two feet into Mills's lane. According to Hutchinson, this chop mark was the point of impact in the accident and was caused by the door seal of Mills's vehicle being forced into the pavement when it was overridden by Huff's vehicle.

The jury found Mills guilty of second-degree manslaughter, leaving the scene of an accident, theft by unlawful taking over \$300, operating a motor vehicle under the influence of alcohol or other substance, and fourth-degree assault. He was sentenced to 10 years in prison for manslaughter, one year plus a fine of \$2,000 for unlawfully leaving the scene of an accident, five years for theft, 12 months plus a fine of \$500 for assault, and 30 days plus a fine of \$500 for DUI. The ten-year and five-year sentences were ordered to run consecutively for a total sentence of 15 years. This appeal followed.

Mills first argues that the trial court erred by allowing the Commonwealth to introduce into evidence photographs of the crime scene and the victim, which he contends were irrelevant, repetitive, and inherently inflammatory. Before the trial, Mills made a motion to exclude several photographs pursuant to Kentucky Rules of Evidence (KRE) 403, which provides that

[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

“An appellate court should reverse a trial court’s ruling under KRE 403 only if there has been an abuse of discretion.” *Thompson v. Commonwealth*, 147 S.W.3d 22, 36 (Ky. 2004) (citation omitted).

The disputed photographs show the interior and exterior of Huff’s vehicle after the accident, with Huff’s body still behind the steering wheel. Mills argues that the photographs were gruesome and inflammatory with very slight probative value. He contends that their introduction was unnecessary as there were numerous other photographs of the accident as well as testimony that demonstrated the severity of the accident and the damage to Huff’s automobile. He further contends that the photographs did not accurately show the damage to Huff’s vehicle caused by the accident because they were taken after the roof of the car had been cut off by emergency personnel. He also argues that the repetitive nature of the photographs was objectionable and overwhelmed the jury.

Although the first photograph does contain the body of the victim at the center, it also shows the point of impact very clearly because the impact was to the driver's side of the car. The second and third photographs have considerable probative value. One shows the passenger's side of the car which is undamaged, thereby calling into question Mills's statement to the police that Huff backed into his lane of traffic. The other photograph shows the interior of the vehicle with the gear shift in "drive," thus further calling into question Mills's contention that Huff was backing out. Huff's body is shown in the photograph, but his face and neck are fully covered. Finally, the fourth photograph is almost identical to the first, although Huff's body is entirely covered.

In *Coulthard v. Commonwealth*, 230 S.W.3d 572 (Ky. 2007), two photographs of a gunshot victim's neck wound were deemed to be properly admitted to show the location of the injury and the cause of death, even though the defendant had admitted killing the victim. *Id.* at 580. "The rule prohibiting the exhibition of inflammatory evidence to a jury does not preclude the revelation of the true facts surrounding the commission of a crime when these facts are relevant and necessary." *Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003) (citing *Salisbury v. Commonwealth*, 417 S.W.2d 244, 246 (Ky. 1967)). "[T]he prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see." *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). By contrast, in *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1991),

it was held that slides depicting the victim's body should not have been admitted when they showed the victim's decomposing face and the head with the scalp and skull removed.

The general rule is that relevant pictures are not rendered inadmissible simply because they are gruesome and the crime is heinous. *Brown v. Commonwealth*, Ky., 558 S.W.2d 599 (1977). This general rule loses considerable force when the condition of the body has been materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer.

*Clark*, 833 S.W.2d at 794.

In our view, the circumstances in this case are much more similar to those in *Coulthard* than to those in *Clark*. The condition of Huff's body as shown in the photographs had not been altered in any way that was unrelated to the commission of the crime; in fact, in two of the photographs, the body was fully covered. Moreover, the photographs depicting the interior of the car and the passenger's side of the car had considerable probative value in casting doubt on Mills's claim that Huff had backed into his path.

In making a KRE 403 ruling, a trial court must consider three factors: the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth.

*Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998) (citation omitted).

When we consider the photographs in light of these three factors, we conclude that



the trial court did not abuse its discretion in admitting the photographs into evidence.

Next, Mills argues that the trial court erred in not allowing his expert witness to introduce a photograph depicting a car of the same year and model as the stolen Ford Taurus driven by Mills. Mills contends that the photograph would have helped to prove that his vehicle was on the right side of the road at the time of the collision. The vehicles involved (the Taurus and Huff's Cavalier) were destroyed shortly after the accident, even though Trooper Dubree had requested they be kept for evidence. Mills's expert, Dr. John Hutchinson, wanted to show the jury a photograph, which Hutchinson had taken at a Ford dealership, of a Taurus of the same year and model as that driven by Mills. Hutchinson intended to use the photo to demonstrate that the undercarriage of the Taurus had made the chop mark in the road. Hutchinson contended that the chop mark proved that the area of impact was on Mills's side of the road and that it was Huff who failed to yield the right of way.

The trial court sustained the Commonwealth's objection to the introduction of the photograph on the ground that it would invite too much speculation, surmise, and conjecture. The trial court was also concerned that there was no one from the Ford dealership to testify as to the make and model of the car in the photograph.

Mills argues that the exclusion of the photograph violated his right under the Sixth and Fourteenth Amendments to the U.S. Constitution to present a

defense. Because the actual vehicles involved in the accident were destroyed, he contends that this photograph was the next best evidence. He further contends that even if there had been photographs taken of the Taurus after the accident, there would have been no assurances that the vehicle had not been further damaged after the initial impact or during the transportation of the vehicle from the accident scene. He also argues that Dr. Hutchinson was fully qualified to testify as to the year, make, and model of the vehicle in the photograph.

“[T]he exclusion of evidence violates a defendant’s constitutional rights when ‘it significantly undermine[s] fundamental elements of the defendant’s defense.’ *United States v. Scheffer*, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998).” *Fields v. Commonwealth*, 274 S.W.3d 375, 401 (Ky. 2008). The record shows that Mills’s expert, Dr. Hutchinson, was able to testify fully and at length about his theory of the case. Dr. Hutchinson presented to the jury his opinion that the point of impact of the two vehicles was two feet into Mills’s lane of travel, based on the chop mark he had identified. He testified that the chop mark was caused by the door seal of the Taurus being pushed into the roadway when the front of the vehicle was overridden by the front of Huff’s vehicle upon impact. He explained to the jury what a door seal was, how it would be pushed down during an override situation, and how it causes the type of chop mark he had identified in the road. The photograph of the undercarriage of the Taurus would have done little to bolster the effect of this testimony. We conclude

that the trial court's exclusion of the photograph did not, therefore, undermine a fundamental element of Mills's defense.

Mills next argues that he was denied due process of law when the trial court denied his motion for a directed verdict. He contends that there was insufficient evidence to sustain his conviction for the offenses of second-degree manslaughter, fourth-degree assault, and driving under the influence.

Mills argues that there was no evidence of any substance to show that he was intoxicated at the time of the accident. Although Ginny Piercy testified that Mills was intoxicated when he came to her house that evening, Mills contends that her testimony should be discounted because she was upset that he had spent the day with another woman. The remaining witnesses for the Commonwealth and for the defense were unable to confirm whether Mills had been intoxicated, and none of them had smelled alcohol on his person.

He also argues that the Commonwealth's theory that he had failed to yield the right of way to Huff was supported by the testimony of an expert, Trooper Young, who had very little experience in comparison to that of his expert, Dr. Hutchinson.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury

questions as to the credibility and weight to be given to such testimony.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Mills's arguments all address the credibility and weight to be given to the testimony; these types of determinations are within the exclusive province of the jury, and, on that ground, the trial court correctly refused to grant a directed verdict. On appeal, we will not "usurp the prerogative of a jury and decide as a matter of law which witnesses are worthy of belief and which are not." *Kentucky Power Co. v. Thompson*, 335 S.W.2d 915, 918 (Ky. 1960).

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

*Benham*, 816 S.W.2d at 187.

Piercy testified that Mills was drunk and staggering when he was at her home between about 10:45 p.m. and midnight. The collision with Huff occurred less than three hours later. The jury was fully informed of Piercy's possible motive to lie, but it nonetheless chose to conclude, based in large part on her testimony, that Mills was intoxicated at the time of the accident. The jury also heard and was able to weigh the testimony of both experts, and it chose to believe that of Trooper Young, who testified that in his opinion Mills crossed the center line of the road and struck Huff's vehicle. Young's testimony was corroborated by

Huff's passenger, Terry Kelsay. We cannot say, upon reviewing the evidence as a whole, that it was clearly unreasonable for the jury to find guilt.

Finally, Mills contends that Trooper Dubree misstated the facts to the grand jury by testifying that Mills told him that he drank six to seven beers on the night of the accident, whereas what Mills had actually told him was that he had only been drinking earlier in the day. Trooper Dubree further misled the grand jury, Mills states, by testifying that there had been nine or ten people at Ginny Piercy's party who all said that Mills was drunk that night. He argues that the grand jury might have decided not to indict him on the more serious charge of murder had it not been for these statements by Trooper Dubree.

Kentucky Rules of Criminal Procedure (RCr) 8.18 provides in part that

[d]efenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

In this case, no objection to the indictment was made prior to trial, nor has Mills shown why the requirement should be waived.

The judgment of the Monroe Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Roy A. Durham  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jeff Conway  
Attorney General of Kentucky

Jason B. Moore  
Assistant Attorney General  
Frankfort, Kentucky