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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002608-MR

STEVEN BRADLEY GILES — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG CLYMER, JUDGE
ACTION NO. 05-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Steven Bradley Giles was convicted of second-degree manslaughter, driving under the influence (DUI), and being a second-degree persistent felony offender (PFO) following a jury trial. He herein

[1] 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 (KRS0 21.580.

appeals from the judgment convicting him and sentencing him to 15 years in prison. We affirm.

On December 11, 2004, Giles and Shirley Maestas, the woman to whom Giles was engaged to be married, went to a party in Giles's father's 1994 Lincoln Continental. Before attending the party, they stopped and picked up Rhoda Brown and Edward Peppers. The party was a company Christmas party sponsored by Brown's employer, and Giles and Maestas were attending at Brown's invitation.

Alcoholic beverages were served at the party, and Giles and Maestas became intoxicated. Later in the evening, the four individuals left the party and proceeded to Brown's residence. Once inside the residence, Brown offered to permit Giles and Maestas to spend the night there because they had been drinking and should not be driving. Brown later gave a statement that she had attempted to get Giles's keys from him.

Giles and Maestas declined the offer and then left Brown's residence and drove toward Ballard County. The vehicle wrecked on U.S. Highway 60 near the Kevil community. An accident reconstructionist, former Kentucky State Trooper Thomas Rottinghouse, testified at trial that the driver of the Giles vehicle had apparently lost control, left the road, then swerved back and left the road on the other side, striking a culvert and an earthen embankment. According to Rottinghouse, the vehicle then struck a telephone pole, breaking it, clipped the guy wire supporting the pole, then ran over a stop sign before going into another ditch.

Rottinghouse, who had been retained on Giles's behalf, testified that the vehicle eventually flipped over and began rolling and spinning, finally coming to rest upside down on top of two vehicles in a salvage yard.

Maestas was thrown from the vehicle, and she was found away from it. Giles was found sitting near the vehicle. Giles was not seriously injured, but Maestas was deceased because of multiple traumatic injuries. Giles's blood alcohol level was later tested and found to be .20%. A blood sample taken from Maestas's body during the autopsy on the following day revealed a blood alcohol level of .30%.

A jury heard the case and convicted Giles of second-degree manslaughter, DUI, and being a second-degree PFO. He was sentenced to 10 years on the manslaughter charge, enhanced to 15 years due to his PFO status. Giles was also sentenced to 30 days on the DUI charge. This appeal followed.

The main issue at trial was whether Giles or Maestas was the driver. On appeal, Giles first argues that the Commonwealth failed to prove beyond a reasonable doubt that he was the driver. Thus, he argues that the trial court erred in denying his motion for a directed verdict.

Giles points to the fact that both Rottinghouse and the reconstruction expert retained by the Commonwealth, Sergeant David White, testified that the facts learned from their investigation did not enable either of them to reach a conclusion as to who the driver was. Giles also states that the remaining evidence was likewise insufficient to overcome his directed verdict motion.

Concerning Brown's statement to a police detective soon after the accident that she had attempted to take Giles's keys from him, Giles notes that Brown's testimony in this regard at trial was less clear. Further, Brown had told an insurance attorney 11 months after the accident that she had tried to get the keys from Maestas, not Giles.

Concerning Peppers' testimony that he saw Giles drive away from the Brown residence with Maestas as the passenger, Giles notes that the insurance lawyer testified that Peppers told him he had been dropped off at "the brick house" before the others proceeded to Brown's residence. Additionally, Giles points out that warrants had been issued for Peppers' arrest in connection with his failure to appear when this case had been previously set for trial and for flagrant nonsupport. Giles argues that at least one of the warrants was changed by the Commonwealth to a summons, and Peppers had been advised of this fact by a letter from the Commonwealth. Thus, Giles states that Peppers' credibility was further lessened because he had a motive to testify favorably to the Commonwealth. Further, in an earlier statement to a police detective, Peppers stated only that "it looked like" Giles was driving the vehicle when it pulled away from Brown's residence. Giles contends that these circumstances taint the credibility of Peppers' testimony.

"On motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would

be clearly unreasonable for the jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id*.

There was evidence at trial of the following: 1) the vehicle belonged to Giles, and he had driven it to Brown's residence, to the party, and back to Brown's residence; 2) when Giles and Maestas began to leave Brown's residence, Brown attempted to get the keys from Giles; 3) after the accident, the measurements of the location of the driver's seat were consistent with a person of Giles's height, not Maestas's height, being in the driver's seat; 4) Peppers stated that he saw Giles drive away from the Brown residence with Maestas as the passenger; 5) Giles admitted to a police detective that he may have been driving; 6) Maestas's blood alcohol level was such that she was likely incapable of driving; 7) all of Maestas's injuries were to her right side, consistent with her being the passenger rather than the driver. Considering this evidence, we cannot say it was clearly unreasonable for the jury to have found Giles guilty of the charges.

Giles's second argument is that the trial court erred in permitting the Commonwealth to introduce evidence concerning the effect of a blood alcohol level of .30% on the average person. Additionally, Giles contends that the court compounded its error when it permitted the Commonwealth to introduce evidence that Maestas would not have been capable of driving with a blood alcohol level that high.

Dr. Fred Mushkat, emergency room physician at Western Baptist Hospital, testified that he was familiar with the effects of alcohol on the human

body and that .30% would be "a very toxic level" and would often be "life-threatening", especially for a "light drinker." Dr. Mushkat also testified that an average person with a blood alcohol level of .30% likely would not be conscious. David Anthony Barton, a forensic chemist with the Kentucky State Police Crime Lab, testified that a person with a .30% blood alcohol level would be in a drunken stupor or unconscious.

Giles contends that the admission of the testimony was error because the testimony was based on false assumptions. According to Giles, the first false assumption was that a .30% blood alcohol level would have certain effects on Maestas, based on her height and weight, with "other things being equal". The second alleged false assumption was that Maestas's blood alcohol level of .30% was an accurate representation of her blood alcohol level at the time of her death, even though the sample was taken during the autopsy. Giles claims the statement is based on a false assumption that a dead body is not going to eliminate or metabolize alcohol already in the blood.

First, we see no error in the court permitting the witnesses to testify generally as to the effects of alcohol on the human body. Both Dr. Mushkat and Barton testified they had been trained in this regard. We believe such evidence was admissible under Kentucky Rules of Evidence (KRE) 702. Likewise, we see no error in permitting the witnesses to testify as to the extent a blood alcohol level of .30% would have on the average person.

As for the testimony of the witnesses relating to the effect such blood alcohol level would have on Maestas, considering her height and weight and "other things being equal", we conclude that any error in permitting the witnesses to testify in this manner was harmless. *See* Kentucky Rules of Criminal Procedure (RCr) 9.24. We do not construe the testimony as specifically relating to the effect on Maestas, but to the effect generally on average persons considering their height and weight.

Further, as that evidence relates to Maestas's blood alcohol reading of .30% at the time of the autopsy, Giles had the opportunity to cross-examine the witnesses concerning the reliability of a blood alcohol level taken from a deceased person. We believe the evidence of Maestas's blood alcohol level was admissible, with questions as to its accuracy concerning its representation of her blood alcohol level at the time of her death being best left for the jury's consideration.

Giles's final argument is that the trial court erred in permitting a police officer to testify that a statement made soon after an event is more reliable than a contrary statement made later by the same witness. This argument is based on the court's allowing Sergeant White to testify that generally a witness's perception of events is best recorded sooner rather than later when the witness has had time to reflect and consider other matters.

The purpose of the testimony was to attempt to discredit the statement Brown had made to the insurance attorney 11 months after the accident. That statement related to whether Brown had attempted to get the keys from Giles, as

she stated initially, or whether she had attempted to get them from Maestas, as she had stated 11 months later to the insurance attorney.

The Commonwealth argues in response that Giles opened the door to such testimony by asking his witness, Rottinghouse, questions regarding the reliability of witnesses. Regardless of the admissibility of the testimony, we believe any error in this regard was harmless. *See* RCr 9.24.

The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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