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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001966-MR
AND
NO. 2009-CA-000247-MR

MARLENA BISHOP

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 08-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Marlena Bishop, appeals the October 14, 2008, Final Judgment and Order of the Pike Circuit Court, entered following a jury trial and conviction on a charge of first-degree assault, for which Bishop was sentenced to ten years. She also appeals the court's denial of her motion for new

trial under Kentucky Rules of Civil Procedure (CR) 60.02, based on alleged perjury and falsified evidence. On appeal, Bishop argues that the court below erred in admitting voluminous medical records under Kentucky Rules of Evidence (KRE) 803(6) in violation of the authentication requirements, that her due process rights were violated when the Commonwealth failed to timely disclose exculpatory evidence, and that the trial court erred in refusing to grant her motion for mistrial. She also argues that the court erred in denying her motion pursuant to CR 60.02. After a thorough review of the record, the arguments of the parties, and the applicable law, we reverse.

On December 22, 2007, Bishop's grandmother, Alice Bishop, who was approximately 88 years old and lived alone, was assaulted with a broom handle and sustained serious injury. Bishop, who lived next door to her grandmother and regularly visited her, testified that she was coming over to get a piece of ham for dinner when she discovered her grandmother lying on the floor of her home, and that she was bleeding, addled, and crawling on the floor. According to Bishop, she tried to render assistance to her grandmother but was unable to do so because her grandmother became combative. Bishop testified that she repeatedly told her grandmother that it was alright, and that it was only "Marlena," and that she was just trying to help her off the floor. Bishop states that she repeatedly identified herself in an attempt to make her grandmother accept assistance. According to Bishop, when the grandmother would not cooperate, she called a neighbor-family member, Charmaine Bishop, for additional help.

Thereafter, Alice was secured in her chair, and Marlana and Charmaine called 911 for additional assistance. Charmaine testified that upon arrival, she asked Alice who had done this to her, and Alice said “Marlana.” EMS arrived shortly thereafter, and Alice was then transported to Pikeville Medical Center, where she was treated for her injuries. Over the objection of Marlana’s counsel, medical records pertaining to those injuries were admitted into evidence at trial and submitted to the jury during deliberation. It is undisputed that no medical professional testified at trial.

Alice Bishop contended that she had been beaten with a broom handle and her statement was taken by the Kentucky State Police. In that statement, Alice stated that she was “not sure who did this to her.” Later, she indicated that she “thought it might have been Marlana.” Marlana also provided a statement to police, stating that she was unsure how Alice received her injuries and that when she arrived, Alice was on the floor, crawling towards the chair. Marlana further stated that when she asked Alice who had done this, Alice started saying Marlana’s name. Subsequently, at the hospital, Alice identified Marlana as the assailant and described how the attack occurred.

At trial, Alice testified unequivocally that she was sure she had been assaulted by her granddaughter, Marlana Bishop. Alice testified that she was sitting in a chair in her living room when Marlana entered her home through the back door, carrying a stick several feet long, with which she beat Alice. Alice testified that Marlana did not speak during the attack, but after the assault, went to

Alice's bedroom and rummaged through her jewelry box before leaving. Alice testified to her condition before and after the assault, stating that she can no longer take care of her own home, or tend to her garden, nor can she move the last two fingers on her left hand. In addition, Alice testified to numerous other health problems which she attributes to the assault.

During cross-examination, Alice testified that she had never been treated for any conditions that might affect her memory or perception. According to Bishop, although she tried to obtain information pertaining to the grandmother's health prior to trial, she was denied by the court. After trial, however, Bishop's counsel received medical documents from a family member which indicated that Alice had been treated and diagnosed with Alzheimer's, dementia, and other conditions in 2004.¹

With respect to the crime scene, Bishop states that there was no "blood scatter" or "castaway."² There was, however, an isolated pool of blood on Alice's hardwood floor. According to Marlana, there was nothing to indicate to law enforcement or other witnesses either at the scene or on Marlana's person that she had perpetrated an assault, nor was there any object found or produced consistent with the object said to have been used to effectuate the assault. In addition, Marlana argues the fact that there was no visible blood on the clothing

¹ Upon discovering that information, Bishop's counsel filed a motion for new trial pursuant to CR 60.02(c) and (d) on October 31, 2008. That motion was denied by the trial court.

² The trail of blood spray consequential to drawing back an object in the opposite direction in preparation for a subsequent blow.

that she was wearing at the time the assault allegedly occurred. The Commonwealth disclosed this fact, as well as the fact that it had the clothing in its possession, to Marlana's counsel at trial. It was also discovered at trial that the Commonwealth had obtained custody of Marlana's clothing shortly after the alleged incident.³

After the case was submitted to the jury, the jury returned and presented a question to the court. The jurors were brought into open court and told that they could not have the police report, although one of the jurors stated that the jury could not agree on what the police stated about the interview with Alice. That juror also stated that the jury was divided because each lawyer had a different version of what Alice had said to the investigating officer. At that point, Marlana made a motion for mistrial, which was denied.

Bishop was charged with assault in the first degree pursuant to Kentucky Revised Statutes (KRS) 508.010 and from that conviction she now appeals to this Court.⁴

On appeal, Marlana argues that the trial court erred in admitting 276 pages of medical records under KRE 803(6) in violation of authentication requirements and her right to confront and cross-examine witnesses. These records consisted of 25 pages of medical records from Pikeville Medical Center and 251

³ The Commonwealth apparently obtained the clothing from a family member, who was instructed to seize those items and deliver possession to law enforcement.

⁴ We note that Marlana also filed a motion for new trial pursuant to CR 60.02. A hearing was held on that motion on December 22, 2008. The trial court subsequently denied the motion in a January 27, 2009, order. Marlana is currently appealing that denial in case number 2009-CA-000247.

pages from University of Kentucky Hospital. Bishop argues that rather than submit the records to the jury for inspection, the Commonwealth should have called a medical professional to review the records and explain them to the jury. While acknowledging that KRE 803(6) does provide an exception to the hearsay rule concerning authentication of business records and that, further, KRE 902(11) allows for self-authentication of business records, Bishop nevertheless argues that hearsay evidence, namely the records at issue in the matter *sub judice*, which contain an expert opinion as opposed to the mere recordation of information kept in the regular course of business, must also satisfy KRE 803(6)(B).

In response, the Commonwealth asserts that the records were properly authenticated and notes that KRE 803 (6)(A) provides that “[a] custodian or other qualified witness . . . is unnecessary when the evidence offered under this provision consists of medical charts or records of a hospital that has elected to proceed under the provisions of Kentucky Revised Statutes (KRS) 422.300 to 422.330[.]”⁵ Thus, insofar as each packet of records contained a certificate from a

⁵ KRS 422.300 provides that:

Medical charts or records of any hospital licensed under KRS 216B.105 that are susceptible to photostatic reproduction may be proved as to foundation, identity and authenticity without any preliminary testimony, by use of legible and durable copies, certified in the manner provided herein by the employee of the hospital charged with the responsibility of being custodian of the originals thereof. Said copies may be used in any trial, hearing, deposition or any other judicial or administrative action or proceeding, whether civil or criminal, in lieu of the original charts or records which, however, the hospital shall hold available during the pendency of the action or proceeding for inspection and comparison by the court, tribunal or hearing officer and by the parties and their attorneys of record.

records custodian indicating that the records had been certified pursuant to KRS Chapter 422, the Commonwealth argues that they are properly authenticated.

At the outset, we note that the standard of review of a trial court's decision to admit hearsay evidence under the business record exception of KRE 803(6) is an abuse of discretion standard. An abuse of discretion occurs when a trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Further, no evidentiary error shall be ground for reversal unless it affects the substantial rights of the parties. CR 61.01 and KRE 103. We review the arguments of the parties with these standards in mind.

Upon reviewing the record and applicable law, we are of the opinion that the records below were in fact properly authenticated. It has been oft recognized that hospital records are admissible as business records as exceptions to hearsay when either properly certified pursuant to KRS 422.300 through 422.330 and authenticated under KRE 902(10) or under KRE 902(11) (*see* Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 7.15[1] (4th ed. 2003)), and KRE 803(6)(A). Having found that the records contained such a certification in this instance, we find that they were indeed properly authenticated.

Beyond her arguments concerning authentication, however, Bishop also asserts that pursuant to KRE 403, the probative value of the records is outweighed by the risk of undue prejudice which could otherwise be avoided by a reasonable alternative. *See Old Chief v. United States*, 519 U.S. 172, 184-85, 117

S.Ct. 644, 652, 136 L.Ed.2d 574 (1997). In response, the Commonwealth argues that Bishop never made this argument to the trial court and that, accordingly, we should not consider them now for the first time on appeal.

Further, as to whether an expert witness was necessary for the introduction of the records, the Commonwealth asserts that it was not necessary and relies upon *Commonwealth v. Hocker*, 865 S.W.2d 323 (Ky. 1993), in support of its arguments. We note that *Hocker* also involved a charge of first-degree assault. The issue on appeal in *Hocker* was whether there was sufficient evidence of serious physical injury to defeat a motion for directed verdict. As in the matter *sub judice*, the prosecution in *Hocker* introduced properly certified medical records without an expert medical witness to testify as to the extent of the injuries. In addressing the issue, our Kentucky Supreme Court found that medical testimony was not an absolute requisite to establish physical injury. The Commonwealth argues that we should find similarly in the matter *sub judice*.⁶

Having found that the records were properly certified in this instance, we nevertheless note that whether the records were properly certified and whether an expert was necessary to explain the records to the jury are two different issues. With respect to the latter, we are compelled to agree with Bishop that an expert was indeed necessary in the matter *sub judice*. In the course of the trial below, the

⁶ We believe *Hocker* to be distinguishable from the matter *sub judice*. While under *Hocker*, it is not necessary to have an expert witness testify for the purpose of establishing physical injury, we do not believe *Hocker* to stand for the proposition that experts are never needed to explain the often confusing content of voluminous records, as were submitted in the matter *sub judice*, ostensibly for the purpose of proving injury.

Commonwealth sought to admit nearly three hundred pages of medical records. This is not unlike the case of *Young v. J.B. Hunt Transportation, Inc.*, 781 S.W.2d 503 (Ky. 1989), wherein our Kentucky Supreme Court discussed KRS 422.300, and in so doing, held that proper authentication under that provision does not automatically assure the admissibility of the records, or abrogate other rules of evidence relating to admission of documentary evidence, including the hearsay rules and the KRE 403 balancing test. *See Young* at 508.⁷

Certainly, had the Commonwealth merely intended to prove that an injury occurred, a fact that Bishop herself does not dispute, it would not have needed voluminous records of the nature actually submitted below.⁸ The records submitted below contained not only facts, but also the opinions, recommendations, and conclusions of the various medical providers who treated Alice.

As to opinions contained within medical records introduced through KRE 803(6), Subsection (B) is illuminating. KRE 803(6)(B) states that, “[n]o evidence in the form of an opinion is admissible under this paragraph unless such

⁷ *See also Welsh v. Galen of Virginia, Inc.*, 128 S.W.3d 41 (Ky.App. 2001), wherein we held that records which qualify under KRE 803(6) are not automatically admitted into evidence.

⁸ Certainly we are not saying that the testimony of a medical expert is necessary in every instance. The need for a medical expert depends in large part upon the potential for confusion generated by medical records which need explanation. Thus, the real question should be whether the opinion “will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” KRE 702. Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science or skill, *Greer's Adm'r v. Harrell's Adm'r*, 306 Ky. 209, 206 S.W.2d 943 (1947), and when the subject matter is outside the common knowledge of jurors, *O'Connor & Raque Co. v. Bill*, 474 S.W.2d 344 (Ky. 1971).

opinion would be admissible under Article VII [Opinions and Expert Testimony] of these rules if the person whose opinion is recorded were to testify to the opinion directly.” Additionally, Robert G. Lawson, *Kentucky Evidence Law Handbook*, § 8.65[9] (4th ed. 2003), provides insightful commentary on this rule in stating that, “Although the language of the rule is less than crystal clear on this point, the case law leaves very little doubt that there must be a showing of expert qualification for the declarant.”

Thus, as to each opinion contained within the medical record, a showing must be made that the recorded opinion in the medical record was an opinion of a qualified medical expert. If this were not true, then Article VII of the KRE would be subverted by KRE 803(6), thereby allowing the admission of medical opinions from experts unqualified to offer such opinions. When medical opinions were admitted below without a proper foundation in the matter *sub judice*, a substantial possibility certainly existed that the jury, without the benefit of any expert insight, would find the information contained in these voluminous records confusing at best.

Accordingly, in the matter *sub judice*, even though the records were properly authenticated, this court is of the opinion that, pursuant to KRE 403, the probative value of any information contained in these records was substantially outweighed by the danger of undue prejudice, confusion of the issues, the misleading of the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

In so finding, we recognize that a dispute exists between the parties as to whether the arguments made under KRE 403 were preserved for our review. Our review of the record indicates that at the time the Commonwealth sought to admit these records into evidence, Bishop objected, and apparently strenuously, as a thirty-minute discussion was conducted in chambers. During that time, Bishop argued that the records contained hearsay, had not been interpreted by a qualified party, and were unredacted. While Bishop did not specifically reference KRE 403 in making these arguments, it is clear that she sought to exclude the admission of the records precisely because they were highly prejudicial to her case.

We believe that admitting nearly 300 pages of medical records in mass without the availability of any physician to explain the content thereof left counsel free to draw whatever conclusions they wished without any fear of evidentiary contradiction. Accordingly, we find that the admission of same was an abuse of discretion on the part of the trial court. While the Commonwealth argues that error in this regard, if it occurred, was harmless, we cannot agree. The medical records at issue were admitted en masse, without redaction of hearsay, including hearsay concerning the possibility of an alleged assailant and the cause of the victim's injuries. No measures were taken, upon admission of the records, to mitigate the prejudice that resulted, leaving the jury free to draw any conclusions they wished from the records without the benefit of an expert opinion

for guidance. Such error was, in the opinion of this Court, not harmless, and was an abuse of the court's discretion. Therefore, we reverse.⁹

Bishop makes three additional arguments. Bishop argues that her right to due process was violated when the Commonwealth failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 106 L.Ed.2d 215 (1963). Next, Bishop asserts that the trial court erred in failing to grant her motion for mistrial when the jury returned from deliberation and indicated that they were in disagreement as to the evidence presented. Finally, Bishop appeals the trial court's denial of her motion under CR 60.02(c) and (d). Having reversed on the aforementioned grounds, we believe these issues to be moot. Accordingly, we decline to address them on the merits at this time.

Wherefore, for the foregoing reasons, we hereby reverse and remand for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

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⁹ In so finding, we decline to address the remainder of Bishop's arguments concerning the Confrontation Clause.