RENDERED: MARCH 15, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002139-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 05-CR-00055

STEVEN BURTON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: The Commonwealth of Kentucky appeals from an order of the Hickman Circuit Court disallowing the testimony of Dr. Gregory Davis and State Police Trooper Kyle Nall in the trial of Steven Burton. Finding no reversible error, we affirm.

In his first trial, Burton was convicted of second-degree manslaughter, second-degree assault, and operating a motor vehicle on a suspended license. On appeal, the Kentucky Supreme Court reversed Burton's manslaughter and assault convictions in *Burton v. Commonwealth*, 300 S.W.3d 126 (Ky. 2009), (*Burton I*) finding reversible error in the admission of Burton's urinalysis results and in the admission of the drug recognition testimony. The facts set forth in *Burton I* provide:

> Burton's convictions stem from an automobile collision that occurred on a rural two-lane road. Burton's automobile collided head-on with an automobile approaching from the opposite direction driven by Jeffrey Bartolo. James Boyd was a passenger in Bartolo's automobile. Other than the occupants of the two vehicles, there were no eyewitnesses to the crash.
>
> Shannon Sayre and Nick Parnell who lived nearby, arrived moments later and both testified at trial of their observations. Sayre heard a loud boom and saw there had been a wreck. She told Parnell, who called 911 and went to the scene of the accident.
>
> Following the collision, Burton's automobile came to rest against a tree. Burton was trapped in his car with a broken arm, but conscious and trying to extricate himself. Burton knew Parnell, and asked him to help get him out. Parnell told him to remain in the car until the ambulance arrived because he might be hurt. Burton, however, asked Parnell not to call the police or the ambulance, asserting he was not hurt. Police and paramedics arrived shortly thereafter.
>
> Buffy Kyle and Mark Travis were the first paramedics to arrive. They found Burton trapped in his car and concluded that he did not appear to have any life-threatening injuries. Kyle went to the other car, while Travis remained with Burton. Travis instructed Burton to

remain calm and not to move because movement could make his injuries worse. Burton, however, continued to struggle.

When Burton finally extricated himself, his fractured arm flopped unnaturally "from side to side." He continued, however, to insist that he was not injured. Travis then tried to walk Burton across the road to the ambulance, but Burton returned to his car. He continued to wander "back and forth" from the car to the ambulance. At one point, Travis had to pull Burton from the path of an oncoming ambulance. Eventually, Travis succeeded in getting him into the ambulance.

Burton first told Travis that he hit a tree but later told him that someone else had been driving the automobile, and that he did not know what happened. At times, Burton appeared aware and oriented, but at other times, he just kept asking about the other car. Kentucky State Trooper John Sims (Officer Sims) thought perhaps Burton had a head injury or some type of amnesia. Burton, however, knew his name and his date of birth.

When Officer Sims spoke to Burton in the ambulance, Burton told him that he did not know what had happened. When pressed, Burton said that he had picked up some friends and that someone other than himself was driving the automobile. But when asked to identify the driver, Burton could not. Then again, he claimed he did not know what had happened. No evidence emerged to corroborate Burton's statement that there was another driver or occupant in his automobile. Officer Sims, however, noted in his report that Burton did not appear to be under the influence of alcohol.

At the hospital, Burton at first refused a urine sample. After he was informed that a catheter would be used to obtain the sample, he assented and provided the sample. Ultimately, the urinalysis tested positive for the presence of marijuana and cocaine but the tests could not determine the concentration of these substances in Burton's system or when he had ingested the substances.

> Boyd and Bartolo meanwhile were not interviewed at the scene as both were airlifted to the hospital. Officer Sims, however, noted that both may have been under the influence of alcohol. Witnesses smelled alcohol around their vehicle and broken beer bottles were observed in and near their vehicle. Bartolo, the driver, died from his injuries later that day. Boyd survived, but has since been confined to health care facilities because of injuries sustained in the crash.
>
> Kentucky State Police accident reconstructionists later determined that Burton's automobile collided with Bartolo and Boyd's vehicle in their lane of travel (slightly to the left of the centerline of the roadway). Burton was subsequently indicted on charges of murder, first-degree assault, and operating a motor vehicle with a suspended license.
>
> At trial, the court instructed the jury on murder, second-degree manslaughter, and reckless homicide for Bartolo's death, and first-degree assault and second-degree assault for Boyd's injuries. The jury found Burton guilty of second-degree manslaughter and second-degree assault, as well as operating a motor vehicle on a suspended license. Burton was sentenced to a total of twenty (20) years imprisonment in accordance with the jury's recommendation of ten (10) years on the second-degree manslaughter conviction and ten (10) years on the second-degree assault conviction, to run consecutively.

Burton at 130-131(footnotes omitted).

As noted, the Kentucky Supreme Court found reversible error in the admission of the urinalysis results and in the in the admission of the drug recognition testimony. On remand, the Commonwealth provided notice that it would call Dr. Gregory James Davis, a medical doctor from the University of Kentucky who is a specialist in the field of toxicology. Burton objected to the

witness. After avowal testimony from Dr. Davis, the trial court ordered that Dr. Davis could not testify at trial because: (1) he had not interviewed Burton; and (2) his testimony would be tainted by his knowledge of the urinalysis that was excluded and found inadmissible by the Kentucky Supreme Court.

The Commonwealth also gave notice that it intended to call State Police Trooper Kyle Nall as a drug recognition expert. According to the Commonwealth, Trooper Nall would testify regarding factors used to determine if a person was impaired, but would not opine about Burton's level of impairment. The court did not hold a hearing regarding Trooper Nall's testimony and ordered that his testimony was inadmissible because: (1) he had never interviewed Burton either; and (2) any testimony he gave would not be outside the common knowledge of the jury. It is from this order that the Commonwealth now appeals.

On appeal, the Commonwealth presents two arguments, namely, (1) the trial court abused its discretion in excluding Dr. Davis's testimony because experts are allowed to rely on inadmissible evidence and third-party information in formulating their opinions; and (2) the trial court abused its discretion by failing to hold a Kentucky Rules of Evidence (KRE) 702 hearing on the admissibility of testimony from Trooper Nall pursuant to *Burton I*.

In response, Burton argues: (1) that the trial court properly excluded Dr. Davis's testimony; and (2) that the Commonwealth never requested a *Daubert*[1] hearing for Trooper Nall, and that the trial court did not abuse its discretion in

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d (1993).

excluding his testimony. With these arguments in mind, we turn to our applicable jurisprudence.

At issue is whether the trial court abused its discretion in disallowing expert testimony. We review a trial court's ruling regarding the admission or exclusion of evidence for abuse of discretion. *See Clephas v. Garlock, Inc*., 168 S.W.3d 389, 393 (Ky. App. 2004*); Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co.* at 581, citing *English* at 945.

KRE 702 permits testimony by an expert witness when:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

The qualification of a witness as an expert is within the sound discretion of the trial court. *Tapp v. Owensboro Medical Health System, Inc*., 282 S.W.3d 336, 339 (Ky. App. 2009); *see also* KRE 702. In *Stringer v.*

Commonwealth, 956 S.W.2d 883 (Ky. 1997), our Supreme Court held that expert opinion evidence is admissible so long as: (1) the witness is qualified to render an opinion on the subject matter; (2) the subject matter is proper for expert testimony and satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); and (3) the subject matter satisfies the test of relevancy, subject to the balancing of probativeness against prejudice as required by KRE 403; and (4) the opinion will assist the trier of fact pursuant to KRE 702. *Stringer,* 956 S.W.2d at 891.

Daubert v. Merrell Dow Pharmaceuticals, Inc., established standards for the admission of expert testimony, which have been adopted in Kentucky. *Miller v. Eldridge*, 146 S.W.3d 909, 913 (Ky. 2004). In discharging its gatekeeper function, the trial court must assess whether the reasoning and methodology underlying the proposed scientific testimony are valid and whether the application of that reasoning and methodology is relevant to the facts at issue. *Id.* at 913–914. *Daubert* set forth certain factors that a trial court may consider when evaluating the reliability of scientific testimony:

> (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

Id. at 914. These *Daubert* factors do not constitute an exclusive list. *Id.* at 918. Moreover, the factors may not even be pertinent given the specific circumstances of a particular case because the gatekeeper function must be "tied to the facts." *Id*.

As noted, we review a trial court's ruling on whether to admit expert testimony under the abuse of discretion standard. *Goodyear Tire and Rubber Co.* at 577. However, "the distinct aspects of the *Daubert* analysis—the findings of fact, i.e., reliability or non-reliability, and the discretionary decisions, i.e., whether the evidence will assist [the] trier of fact and the ultimate decision as to admissibility—must be reviewed under different standards." *Miller* at 915. Therefore, the preliminary findings of fact are reviewed for clear error before the ultimate admissibility decision is reviewed for an abuse of discretion. *Id.* A finding of fact is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence taken by itself or as a whole that "has sufficient probative value to induce conviction" in the minds of reasonable persons. *Commonwealth of Kentucky, Cabinet for Human Resources v. Bridewell*, 62 S.W.3d 370, 373 (Ky. 2001).

The Commonwealth is correct that, "Experts are permitted to rely on information that is otherwise inadmissible, if the information is commonly relied on in their field." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky. App. 1998). *See* KRE 703.[2] However, as noted in *Stringer*, the subject matter

[2] (a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be

of the expert opinion must still satisfy the test of relevancy, subject to the balancing of probativeness against prejudice as required by KRE 403.

In *Burton I*, the Kentucky Supreme Court undertook a detailed analysis of KRE 404 and KRE 403 concerning the urinalysis results. The Court concluded that said urinalysis was improperly admitted:

> Here, neither the lab technicians, nor Dr. Martinez could testify what quantities were present or when the substances had been ingested. In fact, the evidence here showed that the cocaine could have been taken as much as four (4) days prior to the urinalysis test and that the marijuana use may have occurred as much as seven (7) days prior to the urinalysis. Moreover, each witness acknowledged that the urine test indicated absolutely nothing about whether Burton was impaired at the time of the accident.
> ….
>
> Absent a proper context within the other evidence, the introduction of urinalysis results only encouraged speculation. As such, the only real affect the urinalysis results could have had was to brand Burton as a user of drugs. This raises the unduly prejudicial value of the evidence too high to be overcome by the minimal relevancy of its potentially remote use as much as two (2) to seven (7) days prior to the accident.

Burton at 137-138.

---

admissible in evidence.

(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

Sub judice, the Commonwealth argues that the trial court incorrectly determined that Dr. Davis's testimony should be excluded because it was based on inadmissible evidence. We agree that such a conclusion would be in error, albeit harmless, since Dr. Davis's opinion was properly excluded per the court's gatekeeper role.[3]

A court must determine if the expert opinion will assist the trier of fact pursuant to KRE 702. *Stringer,* 956 S.W.2d at 891. Dr. Davis's opinion as presented to the trial court was equivocal; Burton's behavior was consistent with drug use, trauma, or both.

This was the same problem noted in *Burton I*. ("Understandably, given the apparent severity of the head-on-collision, the witnesses' testimony about Burton's conduct… [after] the accident was equivocal.")(*Burton* at 138)(internal footnote omitted). Dr. Davis could not establish when Burton had ingested the illegal substances or whether he was impaired at the time of the accident. Needless to say, the trial court was clearly concerned about the prejudicial impact of mere reference to the urinalysis which underpinned Dr. Davis's opinion. Moreover, without the urinalysis, Dr. Davis admitted that his opinion would become problematic. In exercising its role as a gatekeeper, the trial court did not abuse its discretion in excluding Dr. Davis's opinion.

Last, the Commonwealth argues the trial court abused its discretion by failing to hold a KRE 702 hearing on the admissibility of testimony from Trooper

[3] See analysis *infra*.

Nall pursuant to *Burton I*. Both parties direct this Court's attention to the learned discussion of the Kentucky Supreme Court concerning the drug recognition testimony:

> On August 14, 2006, the day before trial, Burton's counsel received a fax from the Commonwealth stating that it intended to call Mr. Darrell Cook (Cook), a drug recognition instructor for the Department of Criminal Justice Training facility at Richmond, Kentucky. The fax stated that Cook "will testify in regard to drug recognition and the physical signs which point to use of controlled substances. In this case particularly he will speak to blood pressure, dilated eyes, and other relevant factors." Burton filed an immediate written objection to Cook being allowed to testify on grounds that: (1) the Commonwealth's announcement of its intended use of the expert was too late; (2) its expert's opinion was "not supported by a factual basis;" (3) "the opinion was thus irrelevant and inadmissible;" and (4) "the Commonwealth had not provided a curriculum vitae or summary of his report to allow the court or the defense to determine whether [Mr.] Cook is or is not an expert in his field."
>
> On August 15, 2006, the morning of trial, defense counsel again objected to the Commonwealth's last minute calling of Cook, stating that she had not seen his report and had just received the curriculum vitae the previous afternoon. The Commonwealth countered that it had not anticipated using an expert but had only received notice on August 9 that the defense intended to use a toxicologist along with his report. Thus, because the defense had an expert, the Commonwealth felt that it should have one too. While reserving the right to call him during its case in chief, the Commonwealth anticipated using Cook on rebuttal, which would give the defense more time "to look at what he's got." Moreover, the Commonwealth informed the trial court that Cook was the primary drug recognition instructor at Richmond and that his testimony would be in regard to the

information he could extract from the reports of the EMTs and troopers who observed Burton at the scene.

In response, the trial court noted its feelings about expert witnesses, stating "you both got one, you let them both in or neither one of them." The court further stated that it would review the respective motions which had been submitted on the matter and that it could be brought back up when the witness was called. When the Commonwealth called Cook to testify on August 16, the defense reiterated its objections to his testimony, which were overruled.

Having considered Burton's written objection to Cook's testimony on the basis of his "expertise" and the factual basis for his opinions, the court's inclination "(you both got [an expert], you let them both in or neither one of them"), Burton's argument the morning of trial that "it sounds like he's basing his opinion upon information that's not admissible," and Burton's reiteration of his objection when Cook was called at trial, we believe that Burton's objection to Cook's testimony was adequately preserved. Moreover, even though the written objections, arguments, and ruling were conducted without the benefit of a prior report of the witnesses' testimony, we believe the grounds argued by Burton were apparent from the context of the written objections, responses, and discussions with the court. Thus, "[w]hile the objections were not sharply to the point we think they adequately alerted the trial judge to the proposition." *Hardin v. Commonwealth*, 428 S.W.2d 224, 226 (Ky.1968). That being said, even "[a] general objection is sufficient if the evidence is not competent for any purpose." *Ross v. Commonwealth*, 577 S.W.2d 6, 13 (Ky.App.1978).

At trial, Cook testified that he was an instructor at the Department of Criminal Justice Training facility at Richmond, Kentucky, where he is the lead instructor of DUI enforcement training. He is also the state coordinator in Drug Recognition, a position which required two weeks of training.

Cook testified that he had reviewed the ambulance report, that Burton's blood pressure of 148/78 was above normal, and that a pulse rate of 113 was high. He opined that the elevation in blood pressure and pulse could be indicative of cocaine, methamphetamine, marijuana, ecstasy, or LSD use. He also opined that the lowering of blood pressure thirty-five minutes later to 138/83 could indicate that the cocaine was wearing off. Referring to the paramedic's testimony, Cook stated that the fact that a person was "wound up", not responding to commands, or resistant to medical treatment, was indicative of marijuana, cocaine, methamphetamine, or other drug use.

However, the twelve-step Drug Recognition Protocol, which he attempted, in part, to employ, requires an officer's *personal* observation, physical testing and examination of the subject.

The protocol essentially consists of a twelve step systematic assessment of the defendant's vital signs and physical appearance, which in fact is the usual DUI investigation, including the standard field sobriety tests, plus a physical examination. The physical examination incorporates a narrow application of techniques borrowed from the medical field, and includes measuring pupil size and observing pupil reaction to light, taking blood pressure and pulse rate [three separate times], inspecting the oral and nasal cavities, and touching the arm to determine muscle tone. *Williams v. State*, 710 So.2d 24, 28 (Fla.Dist.Ct.App.1998). Thus, "[p]olice officers and lay witnesses have long been permitted to testify as to their observations of a defendant's acts, conduct and appearance, and also to give an opinion on the defendant's state of impairment based upon those observations." *Id.* at 29.

Notably, Mr. Cook was neither a medical doctor nor a pharmacologist. He did not *personally* observe, examine, or test Burton. In fact, he acknowledged that Burton's elevated vital signs and behavior could simply be the result of having just been in a serious car accident and that he could not say definitively whether Burton was under the influence at the time. Such testimony was

based solely upon his review of the ambulance report and thus violated the drug recognition protocol alleged to support his appearance. The only apparent basis then for the admission of his testimony was the trial court's philosophy on experts—"you both got one; you let them both in, or neither one of them."

We have long recognized the weight the jury puts on an expert's testimony because of the "aura of special reliability and trustworthiness" surrounding it. *Hester v. Commonwealth*, 734 S.W.2d 457, 458 (Ky.1987). And, "[t]here is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have a particularly persuasive effect." John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 Or.L.Rev. 349, 367 n.81 (1992). The "danger inherent in the use of scientific evidence is that the jury may accord it undue significance because it associates 'science' with truth." *State ex rel. Hamilton v. City Court of City of Mesa*, 165 Ariz. 514, 799 P.2d 855, 859 (1990). Therefore, "[t]he function of the court is to ensure that the persuasive appeal is legitimate." *State v. O'Key*, 321 Or. 285, 899 P.2d 663, 672 (1995). Trial courts should not overlook the "overall effect that a technique's aura of scientific certainty will have on the jury." *Sampson*, 6 P.3d at 551 (emphasis in original).

The standard of review of a trial court's ruling on the admissibility of expert testimony is whether the trial court abused its discretion. *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 378 (Ky.2000); *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577–78 (Ky.2000). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Id.* at 581. In the present case, the trial court's ruling appears to have been based solely on the fact that because the defense had an expert, the Commonwealth could have one too. We cannot say that this reasoning is supported by sound legal principles.

> Further, Cook's unqualified testimony improperly invited the jury to speculate that Burton could have been under the influence of LSD, ecstasy, and methamphetamine—all illicit substances of which there was no evidence. Although we acknowledge that drug recognition testimony is admissible based upon personal observation, examination, and testing, *see e.g., Williams*, 710 So.2d at 34, we therefore caution the trial court to test this witness and his conclusions per KRE 702 at any retrial.

Burton at 139-41 (internal footnotes omitted)(emphasis added).

Turning now to the Commonwealth's argument that the trial court abused its discretion by failing to hold a *Daubert* hearing concerning Trooper Nall's testimony, we note that the Commonwealth premises its argument on the Kentucky Supreme Court's direction to the lower court to test Mr. Cook, the drug recognition witness, and his conclusions per KRE 702 at any retrial. *Burton* at 141.

The Commonwealth proposed to offer the testimony of Trooper Nall to explain to the jury the factors that a drug recognition expert uses to determine if someone is impaired. The Commonwealth did not plan to use Trooper Nall to testify as to whether Burton was impaired, but sought merely to have Trooper Nall provide the drug recognition factors.[4]

We believe this issue to be resolved by *Burton I* wherein our Supreme Court stated "we acknowledge that drug recognition testimony is admissible based

[4] Burton argues that the Commonwealth failed to move for a *Daubert* hearing for Trooper Nall and thus this issue is unpreserved. We decline to address this argument since the trial court did not abuse its discretion in not permitting Trooper Nall to testify.

upon personal observation, examination, and testing…." *Id.* at 141. Just as in *Burton I*, the drug recognition expert at trial did not personally observe Burton, nor did he subject Burton to drug recognition testing.[5] The record *sub judice* was sufficient for the trial court to measure the proffered testimony of Trooper Nall against the proper standards of reliability and relevance. After our review of the trial court's decision, we conclude that the court did not abuse its discretion in failing to hold a *Daubert* hearing.[6]

The drug recognition examination is, by its nature, observation-intensive, and the reliability of the results of such an exam is intimately tied to the observer's training. Thus, Trooper Nall's testimony, which would merely provide drug recognition factors to the jurors, would have been confusing and would have allowed jurors to speculate on its application to the facts or data. This they cannot do. Thus, we believe that the trial court's ruling excluding Trooper Nall's testimony was within the court's discretion. Lastly, we likewise agree with the

[5] It is notable that no one at the scene of the accident believed Burton's level of impairment, if any, bore enough relevance to the accident to put such an observation in any report.

[6] *See also Hamilton v. Commonwealth*, 293 S.W.3d 413, 417-18 (Ky. App. 2009), wherein this Court addressed when a trial court was not required to conduct a *Daubert* hearing:

> In sum, so long as the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance, a *Daubert* hearing is unnecessary. The Kentucky Supreme Court applied this reasoning to the facts in *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93 (Ky.2008), in which a trial court did not provide a *Daubert* hearing after being requested to do so. There, the Court found that the trial court's denial of such a hearing was not an abuse of discretion.

trial court that such testimony would not be wholly outside the common knowledge of the jury.

Finding no reversible error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shannon Dupree
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky