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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000520-MR

COLE YATES — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 15-CR-00406

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

ACREE, JUDGE: Cole Yates was convicted by a jury of criminal abuse in the first degree, for which he was sentenced to seven years' imprisonment. His lone argument on appeal is that the trial court erred by admitting the *curriculum vitae* of a physician called as an expert witness by the Commonwealth. We affirm.

The infant child of Yates' paramour was taken to an emergency room in Paducah, where an x-ray revealed a broken right arm. The broken arm was set, a significant laceration behind the infant's ear was sutured and the child was sent to a children's hospital in Louisville. In Louisville, a forensic nurse examined the infant and noted his broken arm, sutured ear, avulsed frenulum,[1] and numerous bruises. The nurse gave her assessment to Dr. Melissa Currie, a specialist in child abuse medicine. Dr. Currie personally did not examine the infant.

Yates told investigating officers varying stories, initially denying any knowledge of how the infant was injured. He then switched and told alternating stories that he grabbed the baby by the arm to try to stop him from falling out of Yates' arms and that he had caused the baby's arm to "pop" by pushing on it. Yates also said his fingernail may have scratched the infant's ear and that he (Yates) may have caused the avulsed frenulum by using too much force during a feeding.

Yates was charged with abuse in the first degree, and the case proceeded to a jury trial. An emergency room doctor from Paducah testified about treating the infant and opined that his injuries were inflicted; that is to say, not

[1] The frenulum is "a connecting fold of membrane serving to support or restrain a part (as the tongue)[.]" https://www.merriam-webster.com/dictionary/frenulum#medicalDictionary (last visited April 26, 2018). An avulsion is "a tearing away of a body part accidentally or surgically[.]" https://www.merriam-webster.com/dictionary/avulsion#medicalDictionary (last visited April 26, 2018).

accidental. The forensic nurse from Louisville also described the infant's injuries in detail, after which the Commonwealth called Dr. Currie as an expert witness. Dr. Currie related some of her educational and professional background, including being board certified in child abuse medicine and being a member of an organization of doctors who specialize in child abuse medicine. The Commonwealth then attempted to introduce Dr. Currie's lengthy *curriculum vitae* into evidence, but Yates objected on relevancy grounds only. The objection was overruled, and Dr. Currie eventually opined that the infant's injuries were inflicted. The jury found Yates guilty and he was sentenced to seven years' imprisonment.

Before we address the merits of Yates' argument, we note it is not based solely on the preserved claim of trial court error that the *curriculum vitae* was inadmissible because irrelevant. It is also based on the unpreserved claim of trial court error – presented for the first time to this Court – that the *curriculum vitae* was inadmissible because it was cumulative. *See, e.g., Elery v. Commonwealth*, 368 S.W.3d 78, 97-98 (Ky. 2012) (citing cases holding that an argument on appeal differing from an argument at the trial court is unpreserved). We review unpreserved claims for relief under the palpable error standard of RCr[2] 10.26. Yates asked that we consider his cumulative error argument under the palpable error rule. Under that rule an unpreserved error merits relief only if it is

[2] Kentucky Rule of Criminal Procedure.

"so fundamental as to threaten a defendant's entitlement to due process of law. . . . When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 3-5 (Ky. 2006).

Taking the preserved argument first, we conclude that the trial court did not err by overruling Yates' relevancy-based objection to admitting the *curriculum vitae*. Before testimony based on "scientific, technical, or other specialized knowledge" can be admitted, there must be proof that the testifying "witness qualified as an expert by knowledge, skill, experience, training, or education . . . ." KRE[3] 702. A *curriculum vitae* is relevant because it has a "tendency to make the existence of [the witness's expertise] more probable or less probable than it would be without the evidence" of his qualification to testify. KRE 401. "All relevant evidence is admissible, except as otherwise provided" constitutionally, by Kentucky statute, or by the rules of evidence or other rule of the Kentucky Supreme Court. KRE 402. Yates directs us to no such exception. Therefore, the *curriculum vitae* was properly admitted because it set forth Dr. Currie's professional background, a necessary component of an expert's qualifications, and it sheds light on her credibility.

[3] Kentucky Rules of Evidence.

We now turn to the unpreserved claim of error that the evidence should not have been allowed because it was cumulative. "KRE 403 gives trial courts the discretion (and, in some instances the duty) to limit the admission of relevant evidence under certain circumstances, namely, where the 'probative value is substantially outweighed by' various harmful effects, including 'considerations of undue delay, or *needless presentation of cumulative evidence*.' KRE 403." *Daugherty v. Commonwealth*, 467 S.W.3d 222, 234 (Ky. 2015) (emphasis added). In this case, the trial court acted within its discretion to admit the *curriculum vitae* that, to some degree, may have repeated in writing the credentials about which the expert witness testified. To say the least, allowing the evidence was not palpable error because it did not threaten Yates' entitlement to due process, and there is no probability that the outcome of Yates' trial would have been different had the *curriculum vitae* been disallowed.[4]

[4] We are not prone to citing unpublished opinions, especially those from other jurisdictions. However, claims of error of this type are rare. *State v. Santy*, No. 2 CA-CR 2010-0021, 2011 WL 1047049 (Ariz. App. Mar. 23, 2011) addresses an argument that is strikingly similar to Yates' and which the Arizona court rejected, as follows:

> Santy contends the trial court erred in admitting Dutton's *curriculum vitae* into evidence after she had testified extensively as to her qualifications. Santy argues the *curriculum vitae* "was highly prejudicial, lacked probative value, and was improper hearsay." . . . Here, Dutton's *curriculum vitae* plainly was relevant as to her qualifications as an expert—it demonstrated her "experience, training, [and] education" in her field. . . . Dutton testified extensively about her qualifications—she testified she had worked with sex offenders and victims for over twenty-five years, had conducted "close to seven thousand forensic interviews," and had written articles and "presented [at] numerous national conferences." Given this testimony, even assuming the *curriculum vitae* was improperly admitted into evidence, Santy has not shown that he was prejudiced by it, nor has he cited any

True, the *curriculum vitae* contains many references to child abuse (which is unsurprising given that Dr. Currie practices child abuse medicine), but even though he moved *in limine* to prohibit references to child abuse, Yates did not object at trial when Dr. Currie testified that she was board certified in child abuse medicine, was a member of a professional organization of child abuse doctors, had published an article on head injuries in child abuse victims, and was the medical director in chief of the child abuse program at the University of Louisville. Even if we were to (hypothetically and generously) conclude that the references in the *curriculum vitae* to Dr. Currie's experience with child abuse were cumulative, its admission would not have been egregious or rise to the level of palpable error. *See, e.g.*, *Doneghy v. Commonwealth*, 410 S.W.3d 95, 109 (Ky. 2013) ("We note that [n]ot all evidence that is duplicative is therefore cumulative, and evidence should not be excluded on this ground merely because it overlaps with other evidence. . . . It is undeniable that testimony overlapped to some degree, but some overlap, alone, does not render the evidence cumulative and certainly does not approach palpable error.") (quotation marks, footnotes, citations and paragraph breaks omitted); *Torrence v. Commonwealth*, 269 S.W.3d 842, 846 (Ky. 2008)

> authority to support his claim that somehow a physical document is more likely to influence a jury than witness testimony.

Id. at *4-*5 (citation and paragraph break omitted).

("[W]e, again, reiterate that the erroneous admission of cumulative evidence is a harmless error.").[5]

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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[5] Finally, though there is scant Kentucky precedent directly on point, "courts have regularly excluded resumes or *curriculum vitae* as inadmissible hearsay." *Hosse v. Sumner County Bd. of Educ.*, 2018 WL 1382539, at *3 (M.D. Tenn. Mar. 19, 2018) (citing cases). However, Yates has not raised a hearsay-based argument, and we decline to address the merits of a hypothetical hearsay argument.