RENDERED: September 17, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002180-MR

CRIT FORD — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 1996-CR-75

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GARDNER, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: The appellant, Crit Ford, was convicted on the charge of first degree stalking and sentenced to one (1) year imprisonment. Finding no reversible error, we affirm the conviction.

The charge of first degree stalking against Ford arose from a series of events which occurred in July and August of 1996. Ford and Brenda Caddell were living together with their infant daughter in an apartment in Barbourville. On July 21, Officers Ken Williamson and Randy Clark of the Barbourville Police Department responded to a domestic disturbance call at the couple's house. The officers noticed red marks on Brenda's neck

and blood trickling from behind her ear. Brenda told Officer Williamson that the trouble had started the previous night when their infant daughter vomited. She alleged that Ford became upset and shoved the infant's face into the vomit. Brenda also told Officer Williamson that Ford had become enraged after her father called the house that morning. She stated that Ford had choked her and struck her on the side of her head while she was attempting to put the infant in bed.

Based upon this report, Ford was arrested for assault. Under the guise of calling his mother, Ford telephoned Brenda from the jail. Officer Williamson was present in the apartment taking additional statements when the phone rang. He listened on the extension as Ford asked Brenda to drop the charges.

The officers also prepared an emergency protective order (EPO) for Brenda based upon her allegations. The EPO was entered and served upon Ford while he was in jail. The EPO restrained Ford from any contact or communication with Brenda, and required him to remain at least five hundred (500) feet away from her and her family members at all times. The EPO remained in effect until a hearing on July 25. On that date, Brenda went to court and had the EPO replaced with a domestic violence order (DVO) extending over a period of one (1) year.

On July 31, Ford went to the Knox County Hospital, where Brenda worked as an admissions clerk. Ford left flowers and an envelope for Brenda. Although the contents of the envelope were excluded for lack of authentication, Ford testified that the envelope contained legal papers concerning his visitation rights with the child and a letter for Brenda. A

hospital employee testified that Ford had ample time and opportunity to see Brenda's work schedule.

Later, Ford called Brenda at work. Brenda testified that Ford made threatening statements. Ford admitted calling Brenda, but denied threatening her. As Brenda was leaving work, she and her sister observed Ford's vehicle "circling" the parking lot. Brenda retreated to the hospital and called the police. Brenda subsequently took out a warrant against Ford for violating the EPO.

On August 1, Brenda and a co-worker observed Ford's vehicle twice pull into the hospital parking lot and leave. Brenda again called the police. A Knox County police dispatcher driving in the vicinity of the hospital, after hearing the radio call concerning Ford, observed Ford moving away from the hospital at "a fast trot". Ford was arrested as he attempted to get into his car just outside the hospital grounds.

Ford was indicted by the grand jury on the charge of stalking in the first degree based upon his conduct on July 31 and August 1. He was also charged in Knox District Court with criminal contempt for violation of the DVO based upon his conduct on July 31. Ford was acquitted of the latter charge.[1] Subsequently, Ford was convicted on the charge of first degree stalking. The jury fixed his sentence at one (1) year

[1] The allegations regarding the July 24 incident involving Ford's daughter and his July 25 attack on Brenda were tried separately in Knox District Court. Ford was acquitted on the charge of abusing his daughter, but was convicted of fourth-degree assault on Brenda.

imprisonment, which the trial court imposed. Ford now appeals to this Court.

Ford first argues that the Commonwealth failed to prove that a protective order was in effect at the time alleged for the offense. Ford admits that this issue was not raised before the trial court. He argues that it should be reviewed as palpable error. RCr 10.26.

The circumstances surrounding the entry of the DVO are confused. The district court trial commissioner entered the EPO on July 21, which specifically stated that the order would remain in effect until the scheduled hearing on July 25. A hearing was held before the district court on that date. However, it is not clear whether the Knox District Court issued a separate DVO on July 25, 1996. Rather, the judge merely noted on the recording log sheet that the terms of the EPO were to be continued for a period of one (1) year. Although the log sheet was not signed by the district court judge, it was authenticated by the court clerk. Following the events at issue in this case, the Knox District Court entered a separate DVO on August 8.

As a general rule, we agree with Ford that the DVO itself is the best evidence that a protective order was in effect during the time in which the stalking took place. Commonwealth v. Willis, Ky., 719 S.W.2d 440 (1986). However, under the circumstances of this case, we conclude that Ford conceded this element of the offense of first degree stalking. Ford admitted during his direct examination that he was aware that there was an order in effect on July 31 and August 1 which required him to stay away from Brenda. Moreover, Ford's trial counsel admitted

to both the trial court and the jury that the existence of a protective order was not a contested issue. In addition, Brenda testified that she went to court on July 25 and had the terms of the EPO continued for a full year in the form of a DVO. The Commonwealth also introduced the log sheet from July 25, 1996, indicating that the terms of the EPO were extended for a period of one (1) year. Since Ford never challenged the sufficiency of the Commonwealth's evidence regarding the existence of the DVO, we do not believe that the Commonwealth's failure to introduce the order itself rises to the level of palpable error.

Ford next argues that his conviction for first degree stalking constituted double jeopardy because he had been previously tried in district court for criminal contempt based upon his violation of the DVO on July 31. In a related, although separate argument, Ford contends that the Commonwealth was collaterally estopped from introducing evidence regarding his conduct on July 31 because he had been previously acquitted of intentionally violating the DVO on that date.

In his double jeopardy challenge, Ford argues that criminal contempt for violation of the DVO is a lesser included offense of first-degree stalking, thus barring his trial on the stalking charge. We disagree. In Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996), the Kentucky Supreme Court specifically considered whether a prosecution on the charge of criminal contempt for violation of a DVO can bar a subsequent criminal prosecution for the same conduct. The Court held that double jeopardy does not occur when a person is charged with two (2) crimes arising from the same course of conduct, as long as each

offense requires proof of an additional element which the other does not. Id., at 811.

Non-summary criminal contempt is a crime for double jeopardy purposes. Id. at 812. KRS 403.760 provides that violation of the terms or conditions of a protective order after service of the order shall constitute contempt of court. "A person is guilty of a violation of a protective order when he intentionally violates the provisions of an order issued pursuant to KRS 403.715 to 403.785 with which he has been served or has been given notice". KRS 403.763(1). A person is guilty of stalking in the first degree:

> (a) When he intentionally:
> 1. Stalks another person; and
> 2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of :
> a. Sexual contact as defined in KRS 510.010;
> b. Serious physical injury; or
> c. Death; and
> (b) A protective order or other judicial order as provided for in KRS Chapter 403 has been issued by the court to protect the same victim or victims and the defendant has been served with the summons or order or has been given actual notice.

KRS 508.140.

Criminal contempt requires both a violation of the terms or conditions of a protective order issued by the court, as well as a specific intent to violate the provisions of the protective order in question. In contrast, stalking in the first degree requires a specific intent to stalk, but only actual notice that a protective order is in effect. Thus, the offenses of stalking in the first degree and criminal contempt each require an element of proof which the other does not. Therefore,

double jeopardy does not apply when a defendant is tried for both offenses.

Ford also contends that since he was acquitted on the charge of criminal contempt for violation of the DVO with regard to the events on July 31, the Commonwealth was collaterally estopped from using the same events as a basis for the first degree stalking charge. In Commonwealth v. Hillebrand, Ky., 536 S.W.2d 451 (1976), the Kentucky Supreme Court held that if an issue of fact has been determined against the prosecution in the trial of an offense, the prosecution cannot again litigate that issue of fact upon a later trial of the same defendant for another offense. Id. at 453; *citing*, Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). To ascertain whether the issue was in fact determined on the previous trial, the court on the subsequent trial is required to "examine the record of ... the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Hillebrand, at 453. This holding is in accord with KRS 505.040(2) and KRS 505.050(2), which contain identical language barring a subsequent prosecution following an acquittal in a former prosecution of a different offense.[2]

[2] Both statutes bar a subsequent prosecution following an acquittal in a former prosecution of a different offense where: "The former prosecution was terminated by a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution."

These statutes and the holding in Hillebrand, supra, are also in accord with the United States Supreme Court's post--Ashe decisions in Dowling v. United States, 493 U.S. 342, 350-51, 107 L. Ed. 2d 708, 719, 110 S. Ct. 668 (1990) (holding that the burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was "actually decided " in the first proceeding), and Montana v. United States, 440 U.S. 147, 153, 59 L.Ed.2d 210, 216-17, 99 S.Ct. 970 (1979) (holding that once an issue is "actually and necessarily determined " by a court of competent jurisdiction, that issue is conclusive in a subsequent action involving a party to the prior litigation). If a fact was not "necessarily decided" in the former trial, the possibility that it may have been decided does not preclude re-examination of the issue. United States v. Brackett, 113 F.3d 1396, 1398 (5th Cir.1997), *cert. denied*, ___ U.S. ____, 118 S.Ct. 341, 139 L.Ed.2d 265 (1997); United States v. Lee, 622 F.2d 787, 790 (5th Cir.1980), *cert. denied*, 451 U.S. 913 (1981).

The record of the district court proceedings involving the contempt charge was certified to this Court as part of this appeal. In the criminal complaint, Brenda alleged that on July 31, 1996, Ford "violated a Domestic Violence Order issued by the Knox District Court by coming to affiants' place of employment making inquiries about the affiant while the affiant was on her job". The instruction to the jury in the criminal contempt action asked the jury to determine whether, on July 31, 1996, Ford "in violation of a domestic violence order entered in case no. 96-D-214-001, was within 500 feet of Brenda Caddell." The

jury in the criminal contempt proceeding apparently found insufficient evidence that Ford violated the DVO on July 31 by intentionally being within five hundred (500) feet of Brenda. However, we find that the evidence was admissible to show a course of conduct to prove stalking, even though the evidence by itself was insufficient to convince a jury that Ford intentionally violated the DVO.

Stalking is defined as "an intentional course of conduct directed at a specific person or persons, which seriously alarms, annoys, intimidates or harasses the person or persons; which serves no legitimate purpose and which would cause a reasonable person to suffer substantial mental distress. KRS 508.130(1). "'Course of conduct' means a pattern composed of two (2) or more acts, evidencing a continuity of purpose." KRS 508.130(2). While the jury in the criminal contempt prosecution necessarily determined that Ford did not intentionally violate the DVO by going within 500 feet of Brenda, the jury did not consider any of his other alleged conduct. Ford admitted that he went to the hospital on July 31 to leave papers and flowers for Brenda, and that he called Brenda twice at work on that date. Furthermore, Brenda testified that Ford threatened her during the phone conversations. Therefore, we conclude that the Commonwealth was entitled to introduce evidence of Ford's conduct on July 31 as part of a pattern of conduct to prove stalking, even though some of the same conduct had previously been found insufficient to support a conviction for criminal contempt.

Ford next argues that the trial court erred in allowing Brenda to testify regarding Ford's prior acts of violence and

intimidation against her. Brenda testified as to the incidents which occurred on July 25 and 26 leading up to Ford's arrest. In addition, Brenda alleged that Ford threatened her with a shotgun in March of 1996, and that he assaulted her during a confrontation approximately one (1) month before his arrest.[3]

Even where prior bad acts of evidence is relevant and otherwise admissible, KRE 404(c) further requires the Commonwealth to provide "reasonable pretrial notice to the defendant of its intention to offer such evidence." The Commonwealth did not provide notice of its intent to introduce this evidence until the morning of trial, just prior to the seating of the jury. The trial court overruled Ford's objection to the introduction of this evidence. Ford contends that the Commonwealth failed to provide sufficient pre-trial notice of its intent to introduce evidence of prior bad acts.

"The intent of KRE 404(c) is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in limine and to deal with reliability and prejudice problems at trial." Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 300 (1997); (quoting Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.25 (3rd Ed.1993)). However, the rule allows the trial court to exercise discretion whether to exclude such evidence based on lack of notice. All of the testimony regarding the prior bad acts came from Brenda, who had been previously disclosed as a witness for the Commonwealth. The

[3] Ford does not challenge the relevancy of this evidence to establish a basis for Brenda's fear of his conduct during the time at issue.

events which Brenda testified about involved only her and Ford. Brenda was subject to cross examination regarding her allegations, and Ford denied that they even took place. Although we agree that the Commonwealth failed to present any valid reason why it waited until the morning of trial to provide notice of its intent, we cannot find that Ford suffered any prejudice as a result. Therefore, the error was harmless and does not justify reversal of the conviction. RCr 9.24.

Lastly, Ford argues that he was unfairly prejudiced by the trial court's ruling allowing Officer Williamson to testify regarding prior acts of violence by Ford reported to him by Brenda. We find no error. Brenda testified to these events and was subject to cross examination concerning them. When both the person who made the out-of-court statement and the person to whom the statement is made appear in court as witnesses, the hearsay rule does not apply. Jett v. Commonwealth, Ky., 436 S.W.2d 788, 792 (1969). Therefore, the trial court did not err in allowing Officer Williamson's testimony.

Accordingly, the judgment of conviction by the Knox Circuit Court is affirmed.

Gardner, Judge, Concurs.

McAnulty, Judge, Dissents.

McANULTY, JUDGE, DISSENTING: Respectively, I dissent. KRE 404(c) provides:

> Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such

> notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure. (Emphasis supplied)

"Notice" on the morning of trial is not notice allowing a defendant to properly prepare to rebut evidence against him.

The denial of defendant's motion for continuance and the countenance of the prosecution's dilatory conduct combined to unfairly prejudice this defendant.

We would not hesitate to find an abuse of discretion if the trial court arraigned a defendant in the morning and tried him later that afternoon, the day after issuance of an indictment. Here, the unindicted acts were communicated on the morning of trial clearly depriving this defendant of any opportunity to properly prepare to defend. Gray v. Commonwealth, Ky., 843 S.W.2d 895 (1992).

Therefore, I would vacate this judgment and remand to the trial court for a new trial.

BRIEF FOR APPELLANT

Irvin J. Halblieb
Louisville, Kentucky

BRIEF FOR APPELLEE

A.B. Chandler, III
Attorney General of Kentucky

Christopher M. Brown
Assistant Attorney General
Frankfort, Kentucky