RENDERED: JANUARY 19, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002544-MR

CHARLES RAY GERALD
A/K/A JIMMY RAY GERALD — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
INDICTMENT NO. 04-CR-00122

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: BARBER,[1] JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.[2]

HUDDLESTON, SENIOR JUDGE: On November 17, 2004, a Monroe County Grand Jury handed up an indictment charging Charles Gerald with two counts of criminal attempt to commit murder[3] and three counts of wanton endangerment in the first degree.[4] The charges stemmed

[1] Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

[3] KRS 506.010(4)(b).

[4] KRS 508.060.

from events that occurred at Gerald's residence on November 4, 2004.

Upon arriving at his residence on that date, Gerald and his then-wife, Margaret Gerald, became embroiled in an argument during which Gerald poured milk on Margaret, hit her with a large lamp which caused her to sustain a permanent scar on her right elbow, and destroyed various items located in the kitchen. Margaret was able to retreat to a bedroom and call law enforcement officers several times.

Sometime during these events, Monroe County Deputy Sheriff Lucas Geralds decided to telephone Margaret. Gerald and Margaret both answered the call. Deputy Geralds inquired as to what was transpiring at the residence, to which Gerald replied "It's none of your damned business." Gerald threatened Deputy Geralds, saying "You come out here you son-of-a-bitch and I'll be waiting for you." At this point, Gerald ended the telephone call, grabbed his rifle and some ammunition and left the house. Deputy Geralds called back and spoke with Margaret. Margaret informed Deputy Geralds that her husband was armed and would shoot anyone that came on the property. At this point, Margaret requested that law enforcement officers come to her home.

Deputy Geralds and three other Monroe County Sheriff's deputies, Joe Ford, Paul Turner and Eddie Humes, drove in three cruisers to the Gerald residence. Deputy Ford was the first to

drive onto Gerald's property, followed by a cruiser occupied by Deputy Geralds and Deputy Turner and then Deputy Hume's cruiser. Upon witnessing the officers driving on his property, Gerald fired on them with a Ruger .223 caliber rifle. Deputy Ford's cruiser was hit three times. Just before the first bullet hit his cruiser, Deputy Ford, who was seated in a normal driving position, reached over and tilted his head towards the cruiser's AM/FM radio. The first bullet entered the driver's side windshield directly above the steering wheel at the window tinting line, hit Deputy Ford's left ear and arm, continued through the Plexiglas partition between the front and rear seats and shattered the rear window upon exiting. Two additional shots struck the driver's side door post and the driver's side mirror. The other two cruisers were not hit with gunfire. After being fired upon, the officers did not stop their cruisers on the property. Instead, each deputy activated his cruiser's emergency lights, radioed that shots had been fired and quickly exited Gerald's property.

After Deputies Ford, Geralds, Turner and Hume left Gerald's property, Monroe County Deputy Sheriff Donna Branham arrived. She exited her cruiser and retrieved a bulletproof vest from the trunk of the vehicle. As she was fastening the vest, Gerald fired on her twice. One shot hit her cruiser, causing Deputy Branham to take cover behind the vehicle. Deputy

Branham, who injured her knee during these events, retreated when these shots were fired.

After shooting at the deputy sheriffs, Gerald fled to a neighbor's home and surrendered his rifle. The next morning, Gerald surrendered to Monroe County Sheriff Jerry Gee. After placing Gerald under arrest, Sheriff Gee asked Gerald why he shot at the deputies. Gerald informed Sheriff Gee that he shot at the deputies because they were on his property. Gerald was taken to the Monroe County jail. Subsequently, his property was searched and seven spent rifle shell casings were found.

During Gerald's incarceration, Deputy Jailer Paul Lynn asked Gerald if he wanted anything to eat or if he wanted any blankets. Gerald declined both food and blankets. Deputy Jailer Lynn then proceeded to ask Gerald, "What happened? What the hell went on?" In response, Gerald stated that he did not mean to shoot at Deputy Ford and that he was aiming at Deputy Lucas Geralds. Gerald further informed Lynn that if Deputy Geralds came out, "there would be a shooting" and that he was "a man of my word."

At his trial, Gerald testified on his own behalf. Gerald admitted shooting at Deputy Ford's cruiser, believing that it was occupied by Deputy Geralds. Gerald stated that he shot at the law enforcement officers because "They didn't have no business out there." Geralds also acknowledged shooting at

Deputy Branham's cruiser and further admitted that he was aware that Deputy Branham, not Deputy Geralds, was the occupant of that vehicle.

On October 13, 2005, the jury returned a verdict finding Gerald guilty of one count of criminal attempt to commit first-degree manslaughter, one count of assault in the fourth degree and two counts of second-degree wanton endangerment. The jury recommended a prison sentence of 10 years for the offense of criminal attempt to commit first-degree manslaughter and a prison sentence of 12 months and a fine of $500.00 for each of the remaining offenses, thus constituting a total prison sentence of ten years and fines totaling $1,500.00. On November 10, 2005, a final judgment incorporating the jury's recommended sentence was entered. This appeal followed.

Gerald raises four issues on appeal. First, he contends that Monroe Circuit Court erred when it failed to suppress the statements he made to Deputy Jailer Lynn while incarcerated. Gerald argues that his statements to the deputy jailer were the result of a custodial interrogation and, as such, were inadmissible under *Miranda v. Arizona*.[5]

Gerald further asserts that the circuit court erroneously applied the "booking exception" established by the

[5] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *Miranda* requires the express declaration of a defendant's rights prior to a custodial interrogation.

United States Supreme Court in *Pennsylvania v. Muniz*,[6] to admit his statements. In *Muniz*, the Court held that questions asked of a defendant by law enforcement personnel only to secure the biographical data necessary to complete booking or pretrial service activities fall outside the protections granted by *Miranda*.[7] Such questioning must be reasonably related to the record keeping or administrative concerns of law enforcement.[8]

Gerald is correct in his assertion that the "booking exception" did not authorize the circuit court to admit his statements to Deputy Jailer Lynn. His comments to Lynn did not occur as a result of any booking procedure because Gerald had already been processed into the Monroe County Jail at the time he made the statements.

Nevertheless, we need not address the remainder of Gerald's argument because we believe that any error in admitting his statements to Deputy Jailer Lynn is harmless. Kentucky Rules of Criminal Procedure (RCr) 9.24 provides that

> [n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it

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[6] 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990). The Kentucky Supreme Court adopted the "booking exception" in *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004).

[7] *Muniz, id*. at 601, 110 S. Ct. at 2650.

[8] *Id*.

> appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

The relevant inquiry under the harmless error doctrine "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[9] Here, there is no reasonable possibility that Gerald's conviction was procured because of his statements to the deputy jailer because Gerald admitted during his own testimony that he shot at the deputy sheriffs as they entered his property on November 4, 2004. Gerald's own admissions at trial were sufficient for the jury to convict him. Although the circuit court erroneously relied on the "booking exception" in admitting statements Gerald made to the deputy jailer into evidence, the error was harmless.

Gerald next contends that the circuit court erred when it permitted his ex-wife, Margaret, to testify at his trial. Gerald argues that inasmuch as he was married to Margaret on November 4, 2004, her trial testimony should have been suppressed pursuant to the husband-wife privilege contained in Kentucky Rules of Evidence (KRE) 504. Gerald's argument fails

[9] *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466, 471 (Ky. 1998), quoting *Fahy v. Connecticut*, 375 U.S. 85, 86, 84 S. Ct. 229, 230, 11 L. Ed. 2d 171, 173 (1963).

for two reasons. First, KRE 504 is inapplicable to Margaret's testimony at trial. Pursuant to KRE 504(c):

> Exceptions. There is no privilege under this rule:
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> * * *
>
> (2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:
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> (A) The other;
> (B) A minor child of either;
> (C) An individual residing in the household of either; or
> (D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals named in this sentence. The court may refuse to allow the privilege in any other proceeding if the interests of a minor child or either spouse may be adversely affected.

Furthermore, this Court has held that marital privilege does not apply when spousal abuse is involved.[10]

The events that occurred on November 4, 2004, were part and parcel a domestic disturbance between Gerald and his then-wife Margaret. As a result of Gerald's violent and abusive actions toward his wife, she called for the assistance of law enforcement officers. Five Monroe County Deputy Sheriffs responded to Margaret's call for help. Gerald shot at the Monroe County Deputy Sheriffs during their attempt to respond to Margaret's call for help and investigate her assertion that she was being abused. The deputy sheriffs are third persons against

[10] *Dawson v. Commonwealth*, 867 S.W.2d 493 (Ky. App. 1993).

whom Gerald committed criminal acts during the course of his wrongful conduct against his spouse. Since Gerald's actions invoked the provisions of KRE 504(c)(2) and prohibited him from claiming any marital privilege, the circuit court properly denied the motion to suppress Margaret's testimony.

Furthermore, Gerald's assertion of marital privilege fails because he did not engage in any confidential communications with his wife. Gerald's statement, "You come out here you son-of-a-bitch and I'll be waiting for you" was made over the telephone, directly to Deputy Geralds. Moreover, Margaret made the same observations of the shootings that were made by the deputy sheriffs. The marital communications privilege does not prevent a spouse from testifying concerning observations which anyone else could have made and, in this case, did make.[11]

Gerald also contends that the circuit court erred in admitting a photograph of Deputy Sheriff Joe Ford sitting inside his bullet-damaged cruiser. In the photographs, Deputy Ford is seated in a normal, upright driving position. Gerald asserts that this posed photograph fails to depict Deputy Ford in the same position as he was at the time of the shooting, *i.e.*, bent down, adjusting his radio.

[11] *Wadlington v. Sextet Mining Co.*, 878 S.W.2d 814, 816 (Ky. App. 1994).

In Gorman v. Hunt,[12] the Kentucky Supreme Court held that the admissibility of a posed photograph is matter within sound discretion of the trial court, and its ruling will not be disturbed on appeal except upon clear showing of abuse of discretion. In deciding whether to admit a posed photograph, the circuit court was required to determine whether the photograph: (1) had been properly authenticated; (2) was relevant, tending to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the photograph; and (3) whether the probative value of the photograph was not substantially outweighed by the danger of undue prejudice, confusion or the needless presentation of cumulative evidence.[13]

The photograph in question accurately depicts Deputy Ford's location in the vehicle at the time Gerald opened fire. Deputy Ford testified that he is depicted in the photograph in the same manner in which he was seated when the bullet struck his cruiser's windshield. While seated in this normal driving position, Deputy Ford reached over and tilted his head towards the cruiser's radio. The photograph shows where the bullet entered the windshield in relation to Deputy Ford's head and was relevant to establish the intent of the person who fired the

[12] 19 S.W.3d 662, 667 (Ky. 2002).

[13] *Id*. at 669.

shots. Hence, the circuit court did not abuse its discretion in admitting the photographs.

Finally, Gerald argues that the circuit court erred when it instructed the jury on an offense for which he was convicted, criminal attempt to commit manslaughter in the first degree. Gerald argues that the crime of criminal attempt to commit manslaughter in the first degree is not an offense under Kentucky law.

The Commonwealth correctly points out that Gerald failed to properly preserve this argument for appellate review. RCr 9.54 provides:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

While Gerald tendered jury instructions which did not include an instruction for criminal attempt to commit manslaughter in the first degree, the tendered instructions did not fairly and adequately present Gerald's position concerning this matter. Furthermore, Gerald failed to object to this instruction before the court instructed the jury. The failure to comply with RCr 9.54(2) has consistently been interpreted to prevent review of claimed error in the instructions because of

the failure to preserve the alleged error for review.[14] However, for reasons hereinafter set forth, we will review this argument under RCr 10.26, which provides that

> [a] palpable error which effects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable."[15] A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]"[16] In fact, a palpable error must be so serious in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.[17] Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error.[18] If not, the error cannot be palpable.

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[14] *Commonwealth v. Thurman,* 691 S.W.2d 213 (Ky. 1985)

[15] *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) (citing BLACK'S LAW DICTIONARY (6th ed. 1995)).

[16] *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005).

[17] *Id*.

[18] *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (quoting *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969)), overruled in part on other grounds, *Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983)).

In this matter before us, it is clear that the circuit court committed a palpable error by instructing the jury on the offense of criminal attempt to commit manslaughter in the first degree as a lesser-included offense of criminal attempt to commit murder. This Court, in the 1997 case of *Prince v. Commonwealth*,[19] declared that criminal attempt to commit manslaughter in the first degree is not a criminal offense. In *Prince*, we said that

> Prince contends that the jury should have been instructed on attempt to commit first-degree manslaughter as a lesser included offense of attempted murder, since the jury could have concluded that Prince did not intend to kill Patterson but intended only to cause him serious physical injury. The argument is without merit. To be criminally liable for an attempted crime under KRS 506.010, a person must intend to commit the crime and take a substantial step toward the commission of it. To be guilty of first-degree manslaughter under KRS 507.030(1)(a), a person must intend to "cause serious physical injury to another person," but the actions taken to cause that serious physical injury must actually kill the person. Combining the two statutes, a person would have to, intending only to cause serious physical injury, take an intentional, substantial step toward causing an unintentional, unanticipated death, yet not actually cause death. Such would require an intention to commit an unintentional act.[20]

The Illinois Supreme Court put it succinctly when it said that "[t]here is no such criminal offense as an attempt to achieve an

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[19] 987 S.W.2d 324 (Ky. App. 1997).

[20] *Id*. at 326.

unintended result."[21] As in *Luttrell v. Commonwealth,*[22] the first lesser-included offense under attempted murder in facts such as these is second-degree assault, not first-degree manslaughter.

While it is clear that Gerald was convicted under an instruction that defines an offense that does not exist under Kentucky law, it is also clear that Gerald could not have even been convicted of this offense had he been originally charged with it in an indictment. To be valid, an indictment must charge a public offense in the accusatory part and state necessary facts constituting such offense in the descriptive part.[23] Therefore, Gerald's conviction for criminal attempt to commit manslaughter in the first degree must be reversed and this case must be remanded with directions to vacate Gerald's conviction for criminal attempt to commit manslaughter in the first degree.

That portion of the judgment convicting Gerald of two counts of second-degree wanton endangerment and one count of assault in the fourth degree is affirmed. That portion of the judgment convicting Gerald of criminal attempt to commit first-degree manslaughter is reversed and this case is remanded to Monroe Circuit Court for entry of an order vacating Gerald's

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[21] *People v. Visor*, 62 Ill.2d 578, 343 N.E.2d 903, 910 (Ill. 1975).

[22] 554 S.W.2d 75 (Ky. 1977).

b[23] *Shackleford v. Commonwealth*, 270 Ky. 60, 109 S.W.2d 13 (1937); *Lynch v. Commonwealth*, 248 Ky. 210, 58 S.W.2d 408 (1933).

conviction for criminal attempt to commit first-degree manslaughter.

ALL CONCUR.

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