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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000688-MR

JERRY HAMILTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CR-00420

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE AND WINE, JUDGES; HENRY, SENIOR JUDGE.

WINE, JUDGE: On March 27, 2007, a Fayette County grand jury returned an indictment charging Jerry Wayne Hamilton (“Hamilton”) with one count of attempted murder involving his ex-wife, Brenda Hamilton. The matter proceeded to a jury trial on February 18-20, 2008. At the conclusion of the trial, the jury

found Hamilton guilty of the charged offense. The jury fixed his sentence at fifteen years' imprisonment, which the trial court imposed.

On appeal, Hamilton argues that he was entitled to a directed verdict because the Commonwealth failed to show that any of his actions constituted a “substantial step” toward the attempted murder. In the alternative, he contends that he was entitled to a directed verdict because his conduct clearly demonstrates that he had renounced any intent to murder his ex-wife. We find that there was sufficient evidence for the trial court to submit these issues to the jury. Hence, we affirm the conviction.

The central issue in this appeal is whether Hamilton was entitled to a directed verdict on the charge of attempted murder. The standard for granting a directed verdict is set out in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187 (*internal citations omitted*).

The parties agree that criminal attempt is defined by Kentucky

Revised Statute (“KRS”) 506.010, which reads in relevant part:

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

...

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.

In *Commonwealth v. Prather*, 690 S.W.2d 396 (Ky. 1985), the Kentucky Supreme Court held that the requirement of a "substantial step" requires proof of an overt act which “convincingly demonstrate[s] a firm purpose to commit a crime, while allowing police intervention, based upon observation of such incriminating conduct, in order to prevent the crime when criminal intent becomes apparent.” *Id.* at 397. The Court added that "the steps be strongly corroborative," and that "the emphasis should be on what acts have been carried out and not on what additional acts would have been even more convincing." *Id.* The Court concluded that the defendant’s acts “must be considered under all of the circumstances of the case to discover whether they manifest a clear intent to commit the crime.” *Id.*

Hamilton concedes that he talked about killing his ex-wife. But he contends that he never made any overt acts to carry out this stated intent. While Hamilton and the Commonwealth disagree about the implications of certain facts, they essentially agree about the circumstances which surround the charged offense.

Jerry and Brenda Hamilton were married in February 1992. Two children were born during the marriage. Hamilton and Brenda separated in 2004, but reconciled in 2005. However, they separated again for the final time in December 2006. Brenda left Hamilton and went to Crossville, Tennessee to live with her first husband, Larry Murray (“Murray”).

During the fall of 2006, Hamilton met Robin Horn (“Horn”), who is the mother of a friend of his and Brenda’s children. During the turmoil of the second separation, Hamilton and Horn, along with their children, began spending more time together. He also talked with Horn extensively about the situation with Brenda.

In January 2007, Hamilton prepared and notarized two documents giving temporary custody of his children to Horn. The documents also designated Horn as the children’s permanent custodian “in the event I do not return from my trip or in the event I can not take care of my children for any reason . . . [a]nd in the event of my death”. Upon giving the papers to Horn, he told her that he was planning to go to Tennessee to “blow [Brenda’s] f**king brains out.” Horn also testified that Hamilton later showed her a rifle and talked about various schemes for killing Brenda, Murray, Tanya Murray (Brenda’s daughter with Murray) and

any police officers who “got in the way”. Hamilton also told Horn that she would know when he was going to kill Brenda because his phone would be disconnected.

Horn became very alarmed after Hamilton made these statements and tried to talk him out of it. Failing at that effort, Horn contacted the Lexington, Kentucky and Crossville, Tennessee police departments and informed them about Hamilton’s statements. She contacted them again after she tried to call Hamilton and discovered that his phone was disconnected.

Hamilton actually went to Crossville in February 2007, and there is some indication that he conducted surveillance on Brenda and Murray while he was there. However, he did not take any action against them. Rather, he merely placed two Valentine’s cards, Brenda’s W-2 form and her last paycheck in her mailbox. Upon receiving these items, Brenda contacted the Crossville Police Department. She subsequently obtained a protective order against Hamilton.

After the trip, Jerry returned to Lexington. Horn was wired by the police and arranged to meet Hamilton at a restaurant to talk. Horn testified that Hamilton had dyed his hair and mustache upon returning from Tennessee. Although the recorded conversation is not entirely audible, Hamilton makes several statements which indicate that he still had plans to kill Brenda. Hamilton stated that the protective order put a “damper” on his plans. But later in the conversation, he told Horn that he saw no other option but to kill Brenda. Hamilton added that he did not intend to remain alive after killing Brenda. The police arrested Hamilton shortly after this conversation.

Following his arrest, the police searched Hamilton's van and home. In the van, the police found binoculars, a police scanner, several license plates, a gun case, 380-caliber hollow point bullets, a 9-mm cartridge box, a bag with dark clothing, and a notebook with directions and a check-off list. There was also a book with police call frequencies and a paper on which Jerry had written the police frequencies for the Lexington and Crossville police departments, and home addresses for Brenda, her sister and her daughter. During a search of Hamilton's home, the police found a backpack containing a sheriff's badge, brown gloves, a black ski mask, a black leather skull cap, gun cleaning kits, and a black fanny pack with 9-mm hollow point bullets, and 380-caliber hollow point bullets.

The Commonwealth also notes that Hamilton contacted his daughter, Michelle Davis ("Davis"), after his arrest. He told her to "make sure the packages were safe." Davis was initially unsure about what he meant, but she later learned from other family members that Hamilton kept two guns hidden under the armrest in the van. After finding the guns, the family members turned them over to the police. The Commonwealth maintains that Hamilton had given Davis a coded message to take care of the guns for him.

We disagree with the Commonwealth that Hamilton's post-arrest efforts to hide the guns in his van were acts related to the attempt to murder his ex-wife. At most, it was an attempt to conceal incriminating evidence. However, we find no evidence that this effort was related to the scheme to kill Brenda.

Nevertheless, we find that the Commonwealth presented additional evidence which was sufficient to show that Hamilton made substantial and overt acts to carry out his stated intention to kill Brenda, her ex-husband and her daughter. Hamilton devised a complicated plan to carry out the murders, he assembled the necessary tools and weapons for the task, he made arrangements for his children after he committed the acts, and he traveled to Tennessee to see where Brenda lived and make a note of her habits. When considered with his statements to Horn, we conclude that the trial court properly submitted the charge of attempted murder to the jury.

In the alternative, Hamilton contends that he clearly renounced the attempt. In a prosecution for criminal attempt, a defendant may show that he abandoned his effort to commit the crime “under circumstances manifesting a voluntary and complete renunciation of his criminal purpose...” KRS 506.020(1). Despite his talk, Hamilton notes that he returned from Tennessee without taking any action against Brenda. Hamilton contends that this shows he had abandoned his plans to carry out the murders.

We agree with Hamilton that this evidence would support a finding of renunciation. However, Hamilton’s recorded conversation with Horn after he returned from Tennessee indicates that he had not entirely abandoned his plan to carry out the murders. His statements also suggest that the protective order which Brenda obtained would merely delay his plan. The jury was entitled to consider this evidence to determine whether Hamilton had made complete and voluntary

renunciation of his criminal purpose. Therefore, the trial court did not err by denying Hamilton's request for a directed verdict on this issue.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Frankfort, Kentucky 40601

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky 40601