

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000553-MR

BILLY J. LINDSEY

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 05-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

ACREE, JUDGE: Appellant, Billy Lindsey, seeks to reverse the Edmonson Circuit Court's order denying his motion to vacate and set aside judgment pursuant to Rule of Criminal Procedure (RCr) 11.42. Lindsey alleges that the jury instruction for duress used at trial called for an overly stringent standard.

However, there is not a reasonable probability that the outcome of the case would have been different if the proper standard were used. Therefore, we affirm.

Lindsey was convicted of complicity to commit burglary in the third degree, complicity to commit criminal mischief in the second degree, and persistent felony offender in the second degree. The conviction resulted from the burglary of a pharmacy by Donnie Cannon, an individual who at that time was living with Lindsey's daughter-in-law, Julie Lindsey.

On August 6, 2004, Lindsey made a statement to the police regarding the pharmacy burglary. He indicated he had discussed the burglary with Cannon and suggested which drugs to steal. Lindsey also admitted he gave Cannon a saw to assist him in cutting the shop's roof open, and that he and Julie drove Cannon to a location near the shop prior to the burglary.

After dropping Cannon off, Lindsey returned home and listened to a police scanner in order to warn Cannon of any police activity. He communicated with Cannon via a hand-held radio. During the burglary, the shop's alarm sounded and Cannon fled. Lindsey and Julie went by vehicle to pick up Cannon, but ran out of gas on the way. They subsequently returned home to find Cannon there waiting for them. Lindsey gave Cannon a change of clothes.

Julie, who was also implicated in the crime, initially gave a similar statement to police. She did not indicate that Cannon threatened her or that her involvement in the crime was a result of coercion by Cannon. However, a couple

of days after this initial statement, Julie gave a second statement indicating her involvement resulted from threats made by Cannon against her and her child.

At trial, both Lindsey and Julie Lindsey testified that their involvement in the crime resulted from duress. They testified that Cannon had threatened Julie and her son. There were few specifics given at trial regarding the circumstances of the threats. Julie did testify that Cannon had threatened to tape her infant son to a chair and that Cannon struck her. Lindsey claims to have witnessed Cannon striking Julie. Lindsey also recalled hearing Cannon threatening Julie, but was uncertain as to what was said or when the threats occurred. He testified he could not recall any of the events due to medication he was taking at the time. However, he did indicate that the statements made in his statement to the police were true and accurate.

Lindsey testified that he feared for his life and the safety of Julie and his grandson. An instruction on duress was provided to the court by Lindsey's counsel. Lindsey alleges that the instruction's language was improper.

The instruction required the jury to find that "Cannon coerced [Lindsey] to aid and assist in committing a burglary and criminal mischief by threatening his life if he did not do so." Lindsey avers that this instruction required an overly stringent standard that is not required by the duress statute. As a result of this mistake, he alleges he did not receive effective assistance of counsel and was denied due process.

Even if Lindsey's counsel was ineffective, still he "must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct 2052, 2064 (1984). In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. With this standard in mind we turn to the alleged error.

Kentucky Revised Statute (KRS) 501.090 dictates that:

1) in any prosecution for an offense other than an intentional homicide, it is a defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use of, or a threat of the use of, unlawful physical force against him or another person which a person in his situation could not reasonably be expected to resist.

2) The defense provided by subsection (1) is unavailable if the defendant intentionally or wantonly placed himself in a situation in which it was probable that he would be subject to coercion.

KRS 501.090. The standard set forth in the statute is substantially less stringent than the standard used at trial. The jury instruction required that Lindsey feared losing his own life. The statute however, only requires that Lindsey feared a threat of unlawful physical force and does not require that the threat of physical force be

deadly force, or that the force be directed at him. In this case, the majority of the alleged threats were directed at Julie Lindsey and her son.

Assuming Lindsey's counsel was ineffective for proffering this instruction, it is necessary to consider whether this error was harmless. In order for the error to warrant reversal there must be a reasonable probability that the outcome of the case would have been different if the proper instruction were given.

A defense of duress requires not only that Lindsey be coerced by an unlawful threat of physical force against himself or another person, the coercion must be such that "a person in his situation could not reasonably be expected to resist." KRS 501.090 (1).

In *Bates v. Commonwealth*, an individual claimed that his escape from prison was coerced by threats made against him by other prisoners. *Bates v. Commonwealth*, 145 S.W.3d 845, 846 (Ky.App. 2004). The court determined that he was not entitled to an instruction on duress because there was "nothing in the evidence that anyone coerced or forced Bates to commit the act of escape." *Id.* at 847. In addition, the court determined that he could reasonably have been expected to resist the coercion. *Id.* 847-48. Specifically, Bates could have avoided the threats by utilizing the protection of prison officials rather than engaging in criminal conduct. *Id.*

Likewise, in this case, there is little evidence to support Lindsey's assertion that he was coerced into committing the crime. Lindsey was unable to recall when or where the threats were made. Nor was he able to recall what was

said. Further, Lindsey did not mention the threats in his statement to the police and did not then allege that Cannon had coerced his involvement. Despite Lindsey's testimony that he feared Cannon, he was not too frightened to implicate him in his statement to the police.

Even if the alleged coercion did occur, Lindsey had multiple opportunities to free himself and his daughter-in-law from the coercion; he simply needed to call the police. The testimony indicates that there were multiple occasions when Lindsey and Julie were not in Cannon's presence, including the time Cannon was actually in the pharmacy. One could expect that a reasonable person would have taken the opportunity to call for help if he were being coerced to commit a crime against his will.

Given the multiple opportunities that Lindsey had to resist the coercion, Lindsey could not have succeeded on his claim for duress upon this record. Thus, there is not a reasonable probability that the outcome of his case would have been different if the correct standard was used. Any error that occurred was harmless and the decision of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Dixon Bullock
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky