

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000316-MR

JASON MOSS, A/K/A
JASON BIERMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NOS. 07-CR-003121 AND 08-CR-000646

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: Jason Moss brings this appeal from a January 14, 2010, judgment of conviction sentencing Moss to five-years' imprisonment and ordering him to pay court costs. We affirm in part, reverse in part, and remand.

Moss was indicted upon the offenses of second-degree assault, tampering with a witness, and with being a second-degree persistent felony offender. The charges stemmed from a violent altercation between Moss and his girlfriend, T.M.

A trial by jury ensued. The jury acquitted Moss upon the offense of second-degree assault but convicted him upon the offense of tampering with a witness and adjudged him guilty of being a second-degree persistent felony offender. By final judgment entered January 14, 2010, Moss was sentenced to five-years' imprisonment. This appeal follows.

Moss contends that the trial court erred by denying his motion for directed verdict upon the offense of tampering with a witness. A directed verdict is proper if the jury could not find defendant guilty beyond a reasonable doubt. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991). The evidence and all inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *See id.*

The offense of tampering with a witness is codified in Kentucky Revised Statutes (KRS) 524.050 and provides, in part:

(1) A person is guilty of tampering with a witness when, knowing that a person is or may be called as a witness in an official proceeding, he:

(a) Induces or attempts to induce the witness to absent himself or otherwise avoid appearing or testifying at the official proceeding with intent to influence the outcome thereby[.]

To commit the offense of tampering with a witness under KRS 524.050(1)(a), defendant must: (1) possess knowledge that a person may be called as a witness in an official proceeding, (2) induce or attempt to induce the witness to be absent from the proceeding or to avoid appearing or testifying therein, and (3) do so with intent to influence the outcome of the proceeding.

In the case *sub judice*, Moss wrote two letters and made five phone calls to his girlfriend, T.M., while incarcerated awaiting disposition of the charges. In these letters and phone calls, Moss pleaded with T.M. not to testify at trial and informed her that he was facing a possible ten-year sentence of imprisonment. In a particular letter, Moss implored T.M. not to testify at trial and explained that his attorney opined T.M. could simply state that she did not remember the events or could “plead the 5th” amendment. Obviously, Moss’s intent was to induce T.M. to “avoid appearing or testifying at” trial so as to ensure an outcome in his favor. Upon the whole, the evidence was sufficient to present a prima facie case of tampering with a witness under KRS 524.050(1)(a). Thus, the trial court properly denied Moss’s motion for directed verdict.

Moss alternatively argues that the trial court committed reversible error by tendering an improper jury instruction upon the offense of tampering with a witness. Specifically, Moss claims that the jury instruction erroneously set forth the dates he allegedly committed the offense. According to Moss, the indictment charged that he committed the offense between April 20 and April 30, 2007. However, Moss points out that the written instruction submitted to the jury

erroneously set forth the date as March 26, 2007. As a result of this error, Moss asserts entitlement to a new trial.

The record reveals that the written jury instruction did erroneously set forth that the crime occurred on March 26, 2007; however, the trial court was made aware of the error before submitting the instruction to the jury and orally instructed the jury that the correct dates were between April 20 and April 30, 2007. As such, the record affirmatively demonstrates that the jury was informed as to the correct date of the commission of the charged offense. Thus, there is no reason to believe the jury was misled as to the correct date of the offense.

Moreover, a jury instruction properly setting forth the law will not be regarded as prejudicially erroneous merely because of a clerical error. *Howe v. Com.*, 462 S.W.2d 935 (Ky. 1971); *Stringer v. Com.*, 956 S.W.2d 883 (Ky. 1997). And, an erroneous date in a jury instruction does not amount to reversible error unless the time the offense occurred is a material issue in the case. *Id.* Here, the time the offense occurred was not material; thus, we believe the jury instruction did not amount to reversible error.

Next, Moss argues that the trial court committed reversible error by the admission of certain evidence of bad acts in contravention of Kentucky Rules of Evidence (KRE) 404(b). For the reasons hereinafter stated, we disagree.

The objectionable evidence centered upon certain testimony of T.M.'s mother and is set forth by Moss:

[T.M.]’s mother testified that she received a phone call from [Moss] a week to ten days after the alleged assault, prior both to [Moss]’s arrest and the time period of the witness tampering charge. She testified that [Moss]’s friendly conversation turned “nasty” when she refused to tell him [T.M.]’s location. They argued, and according to her, [Moss] closed the conversation by telling her to “watch her back;” [T.M.]’s mother also answered affirmatively to the Commonwealth’s inquiry of whether [Moss] had said that he would hurt the family if he had to go to jail.

Moss’s Brief at 19 (citations omitted).

KRE 404(b) provides:

- (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
 - (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
 - (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Under KRE 404(b), evidence of a defendant’s other wrongful acts may not generally be admitted to prove defendant’s character and that he acted consistently therewith. Nevertheless, such evidence may be admissible for other purposes, such as to demonstrate motive, opportunity, intent, preparation, plan, knowledge, or identity.

The trial court ruled that the testimony of T.M.’s mother was admissible to demonstrate a continuous course of conduct by Moss and, thus, was admissible per

KRE 404(b). Considering the testimony of T.M.'s mother, we cannot say that the trial court abused its discretion by so ruling. *See Harp v. Com.*, 266 S.W.3d 813 (Ky. 2008). Moreover, even if the admission of such testimony were improper, we are convinced that no reversible error resulted – and, there does not exist a reasonable probability that the outcome of the trial would have been different absent admission thereof. *Crane v. Com.*, 726 S.W.2d 302 (Ky. 1987). Hence, we reject Moss's above argument.

Moss finally contends that the trial court committed reversible error by ordering him to pay court costs. Moss asserts that he is indigent and that it is improper to assess court costs upon an indigent defendant. We agree.

The Supreme Court in *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010) recently held that court costs may not be imposed upon an indigent defendant. We, thus, reverse the trial court's imposition of court costs upon defendant and remand upon this singular issue.

For the foregoing reasons, the judgment of conviction of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded upon the sole issue of imposition of court costs.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Cicely J. Lambert
Assistant Appellate Defender
Office of the Louisville
Metro Public Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky