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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001884-MR

ROBERT GILL

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 09-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

WINE, JUDGE: On January 9, 2009, a Jessamine County grand jury indicted Robert Gill on one count each of first-degree wanton endangerment and attempted murder. The wanton endangerment charge stemmed from an altercation between Robert Gill (“Robert”) and his estranged wife, Deborah Gill (“Deborah”), on October 30, 2008. The attempted murder charge stemmed from a November 28,

2008 incident also involving Deborah. The matter proceeded to a jury trial on both charges on August 25, 2009. The jury acquitted Robert of the wanton endangerment charge, but convicted him of the attempted murder charge. The jury fixed his sentence at ten years' imprisonment, which the trial court imposed.

On appeal, Robert argues that the instructions given by the trial court were erroneous, that he was entitled to a directed verdict on the charge of attempted murder, and that the trial court erred by allowing admission of irrelevant evidence. We conclude that Robert was not entitled to an instruction on the lesser charge he requested and that the other issues relating to the instructions are not preserved for review. We further find that the Commonwealth submitted sufficient evidence of intent to submit the attempted murder charge to the jury. Finally, while the trial court improperly admitted irrelevant evidence, we find that the error was harmless beyond a reasonable doubt. Hence, we affirm.

Since these issues involve factual matters, we will briefly set out the relevant facts behind the charges. On October 31, 2008, Deborah filed a domestic violence petition against Robert based on an incident that occurred on October 30, 2008. She alleged that Robert had held a knife to her, knocked her down, and threatened to kill her. Based on this petition, the Jessamine Family Court granted an Emergency Protective Order. Following a hearing on November 5, 2008, the Jessamine Family Court granted Deborah a Domestic Violence Order ("DVO"), which prohibited Robert from engaging in any further acts of abuse or threats of

abuse. The order further prohibited Robert from having any contact with Deborah, including a provision requiring that he remain at least 1,000 feet away from her.

On November 28, 2008, Robert went to Keene Springs Shoppe, a restaurant owned and operated by Deborah, and confronted Deborah in the kitchen. Two employees, Brittany Wiley and Jena Reynolds, witnessed the confrontation. According to testimony, upon entering the back door, Robert went straight toward Deborah saying “Do you remember me? Do you remember me?” He then pulled a black-colored gun, aimed it at Deborah, and pulled the trigger. The gun malfunctioned and did not fire.

Robert then told Deborah that he would shoot her if she did not leave him and their daughter alone. Deborah started to run for the back door while Robert was trying to fix the gun. Robert caught up to Deborah, pushed her down and repeated his threat to kill her. However, Robert could not get the gun to operate and Deborah soon convinced him to leave. Two .32 caliber bullets were found on the floor of the restaurant, but the gun was never found.

Robert admits to the November 28, 2008, incident, but denies that he ever intended to harm Deborah. He states that he was angry because he had found out that Deborah was having an affair and had seen an attorney about obtaining a divorce and custody of their daughter. Robert testified that the gun he used was a dart gun and not a firearm. He also testified that he had been drinking all day and did not clearly remember the entire incident.

Robert first argues that the trial court erred when it refused to instruct the jury on lesser included offenses supported by the evidence. Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge. *Slaven v. Commonwealth*, 962 S.W.2d 845, 856 (Ky. 1997). Robert relies heavily on *Perry v. Commonwealth*, 839 S.W.2d 268, 271-273 (Ky. 1992), in which the Kentucky Supreme Court held that Kentucky Revised Statute (“KRS”) Chapter 508, assault offenses, can be lesser-included offenses of attempted murder. In reaching this conclusion, the Court rejected “a strict statutory ‘elements’ approach . . . [that] looks to the elements of the main and lesser crimes as set out by the applicable statutes, rather than . . . the charge or the evidence.” *Id.* at 272. Rather, the Court held that an offense is included when it is established by the same or fewer facts than the primary offense. *Id.* at 272

The Commonwealth notes that just five years after *Perry*, in *Commonwealth v. Burge*, 947 S.W.2d 805, 809-11 (Ky. 1997), the Kentucky Supreme Court returned to the “same elements” analysis found in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, the court must look to the elements of the charged and lesser offense. If each statute requires proof of an additional or different fact which the other does not, then an acquittal or conviction under one statute does not exempt the defendant from prosecution and punishment under the other. *Burge, supra* at 811; *Blockburger, supra* at 304, 52 S.Ct. at 182. The Commonwealth argues that the

adoption of the *Burge/Blockburger* test implicitly overruled the contrary analysis in *Perry*.

We recognize that the Supreme Court has never explicitly overruled *Perry* and has not had an opportunity since *Burge* to reconsider whether an assault offense can be a lesser-included offense to attempted murder. *See, Holland v. Commonwealth*, 114 S.W.3d 792, n.6 (Ky. 2003). Furthermore, the *Burge/Blockburger* test applies to determine whether a charge is a lesser-included offense for double jeopardy purposes. However, we conclude that the “same elements” test of *Burge* and *Blockburger* is relevant to determine whether a lesser-included offense instruction is required.

As noted in *Cecil v. Commonwealth*, 297 S.W.3d 12 (Ky. 2009), “[d]ue process requires a lesser-included offense instruction ‘only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.’” *Id.* at 18. However, the Court has also emphasized that “[t]he fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser included offense of the charged offense.” *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). Rather, a lesser included offense is one which “is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” KRS 505.020(2)(a). “[I]f the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the

greater offense, but is simply a separate, uncharged offense.” *Colwell v.*

Commonwealth, 37 S.W.3d 721, 726 (Ky. 2000).

Even if KRS Chapter 508 assault offenses remain as lesser-included offenses of murder under the *Burge/Blockburger* test, we cannot find that this extends to terroristic threatening. A person is guilty of third-degree terroristic threatening when he “threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person.” KRS 508.080(1)(a). On the other hand, a person is guilty of attempted murder when, with the intent to kill someone, he takes a substantial step toward killing him. KRS 506.010(1)(b) (criminal attempt); KRS 507.020 (murder). In other words, terroristic threatening requires a threat to commit an act, while attempted murder requires a state of mind and an act, but no threat. Since terroristic threatening requires proof of a different fact, it is not a lesser-included offense of murder. Therefore, the trial court did not err by denying Gill an instruction for terroristic threatening.

Gill also contends that he was entitled to an instruction for first-degree attempted manslaughter. He also maintains that the evidence supported defenses of extreme emotional disturbance and intoxication. However, he did not request any of these instructions. Kentucky Rule of Criminal Procedure (“RCr”) 9.54(2) provides that “[n]o 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.” “[T]o preserve any error relating to the failure to give an instruction, there must be an objection in the record stating specifically the matter to which the party objects and the ground therefore.” *Greene v. Commonwealth*, 244 S.W.3d 128, 137 (Ky. App. 2008).

Gill asks this Court to review these issues under the palpable error standard of RCr 10.26. However, the Kentucky Supreme Court recently stated that palpable error review of an unpreserved error concerning instructions is discretionary in light of the more specific language of RCr 9.54(2). *Chestnut v. Commonwealth*, 250 S.W.3d 288, 305 (Ky. 2008). *See also, Johnson v. Commonwealth*, 105 S.W.3d 430, 435 (Ky. 2003). Moreover, the error must “seriously affect the ‘fairness, integrity, or public reputation’ of a judicial proceeding in order to be considered palpable under RCr 10.26.” *Page v. Commonwealth*, 149 S.W.3d 416, 422 (Ky. 2004) (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). Under the circumstances of this case, we decline to address the merits of these issues.

Gill next argues that he was entitled to a directed verdict on the charge of attempted murder. He contends where there is evidence of extreme emotional disturbance, the issue becomes an element of the offense of murder, requiring the prosecution to prove the absence of extreme emotional disturbance. *Greene v. Commonwealth*, 197 S.W.3d 76, 81 (Ky. 2006). Along similar lines, Gill also argues that he conclusively established that he was intoxicated at the time of the

November 28, 2008 incident. Since either extreme emotional disturbance or intoxication would negate the element of requiring a showing that he intentionally attempted to kill Deborah, Gill maintains that he was entitled to a directed verdict on these issues.

As noted above, Gill did not raise these issues before the trial court, either as instructions to the jury or as a bases for his motion for a directed verdict. Kentucky Rule of Civil Procedure (“CR”) 50.01 requires that “[a] motion for directed verdict shall state the specific grounds therefor.” The failure to state a specific ground for directed verdict will foreclose appellate review of the trial court's denial of the directed verdict motion. *Johnson v. Commonwealth*, 292 S.W.3d 889, 898 (Ky. 2009).

Although these specific grounds are not preserved for review, Gill did move for a directed verdict generally on the ground that the Commonwealth failed to present sufficient evidence that he intended to murder Deborah. The standard for granting a directed verdict is set out in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (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.

Gill testified that he never intended to hurt Deborah and that he believed at the time that he was using a dart gun, not a firearm. Several other witnesses testified that it would have been out of Gill's character for him to attempt to kill anyone. Given this evidence, his inability to fire the gun, and the other evidence regarding his intoxication and emotional state, Gill maintains that the jury could not reasonably find that he intended to kill Deborah.

We disagree. Intent to kill may be inferred from the defendant's conduct and the circumstances surrounding the crime. *Hudson v. Commonwealth*, 979 S.W.2d 106, 109 (Ky. 1998). Gill came into the kitchen of the restaurant armed with a firearm. He pointed the gun at Deborah and repeatedly threatened to kill or shoot her. Several witnesses testified that Gill pulled the trigger several times, but the gun malfunctioned and did not fire. Deborah also testified that she saw Gill attempt to fix the gun and re-load it after he followed Deborah out the back door. Although Gill denied that he had used a real firearm, several other witnesses testified that he had bullets in his hand. We conclude that there was sufficient evidence for the jury reasonably to infer intent.

Finally, Gill argues that the trial court abused its discretion by allowing the Commonwealth to introduce evidence of a shotgun and shells. Two days after his arrest, while Gill was in the hospital, the police searched his home.

During the search, the police found a single-barrel, .20 gauge Winchester shotgun and four .20 gauge shotgun shells. The parties agree that the shotgun was not the weapon Gill used during the November 28, 2008 incident. Nevertheless, the trial court allowed the Commonwealth to introduce the shotgun and shells as evidence showing Gill's intent to kill Deborah.

As a general rule, guns not related to the crime are inadmissible.

Major v. Commonwealth, 177 S.W.3d 700, 710-11 (Ky. 2006); and *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 756 (Ky. 2005). The Commonwealth cites to a recent unpublished case by the Supreme Court which suggested that this rule is not absolute and upheld the admission of guns and ammunition which were not shown to have been used in the commission of the charged crime. *Goodman v. Commonwealth*, 2008 WL 2167538 (Ky. 2008). In *Goodman*, the Court acknowledged the general rule in *Major* and *Gerlaugh*, but found that the facts of its case were distinguishable from the other cases. In particular, after the defendant in *Goodman* shot his wife, he drove to his home where a “small arsenal of weapons and ammunition was stored.” Once he arrived, he ordered his family to leave, telling them that the police were coming because he had just killed his wife. Even though there was no evidence that Goodman had used these particular weapons during the ensuing shootout and standoff with police, the Supreme Court held that the presence of the guns was relevant to show that Goodman went to the house with the intent to engage with any police officer who may arrive. *Id.* at 5-6.

Unlike in *Goodman*, there is no evidence that the shotgun found at Gill's house has any relation at all to the charged crimes. The Commonwealth maintains that the shotgun and shells were relevant to show Gill's violation of the DVO as evidence of his intent to murder his wife. However, Gill was not charged with possessing the shotgun in violation of the DVO. By itself, Gill's mere continued possession of the shotgun in violation of the DVO is not evidence of intent to kill Deborah. Furthermore, there was no evidence that he obtained the shotgun in anticipation of using it against Deborah. Given the absence of any connection to the charged offense, the only purpose for introducing the shotgun and shells was to show Gill's propensity to commit a certain type of crime. Since this is not a permissible purpose for admission of evidence of prior bad acts under Kentucky Rule of Evidence ("KRE") 404(b), we conclude that the trial court abused its discretion by allowing introduction of the shotgun and shells. *Major, supra* at 707.

But while the trial court erred in admitting the shotgun and shells, we conclude that any error in this circumstance was harmless beyond a reasonable doubt. RCr 9.24. "Our harmless error standard requires 'that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.'" *Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky. 2005) (quoting *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969), overruled on other grounds by *Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983)).

Although intent was a contested issue at trial and the Commonwealth introduced the shotgun and shells to show that Gill intended to kill Deborah, there was substantial other evidence to demonstrate Gill's intent. In fact, as noted above, Gill's conduct was fairly unequivocal. Considering the significant evidence supporting a finding of guilt, we cannot conclude that there is a substantial possibility that the result would have been different if the shotgun and shells had not been introduced. Therefore, the error was not prejudicial.

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

ALL CONCUR.

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