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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000089-MR

MARK SEALS — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 12-CR-00261

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Mark Seals appeals from a Bell Circuit Court judgment imposing a total sentence of eleven years after a jury found him guilty of three counts of retaliating against a participant in a legal process in violation of KRS[1] 524.055. We affirm.

[1] Kentucky Revised Statutes.

The primary evidence against Seals consisted of statements he made to fellow inmates at the Bell County Detention Center where he was incarcerated on a charge of contempt of court for violating an emergency custody order relating to Crystal Daniels, his ex-wife. Inmate Chad Knipp reported to the County Attorney, Neil Ward, that he heard Seals make threats against several individuals, including Crystal Daniels, the district judge, Robert Yoakum, and Ward. According to Knipp, Seals wanted these individuals to be tortured, killed, tied to a tree, and have a water hose with Budweiser inserted into their rectums. Seals was obsessed, talking about it several times a day, and was offering to pay someone in oxycodone to harm Daniels, Yoakum and Ward.

After learning of these statements, police sent Knipp into the jail wearing a hidden microphone. He pulled Seals into the shower area and asked him if he wanted it done and listed the names of people who could do it. Seals responded affirmatively when Knipp asked him if he was serious about having the crimes committed. Seals explained that he wanted to do it because there was a conspiracy against him by the judge, the prosecutor and his ex-wife. Knipp told Seals he wanted cash instead of drugs as payment. Seals replied that if he got a settlement of disability back pay he would pay Knipp.

Neil Ward later testified that Seals was due to receive approximately $20,000 in back pay on a Social Security Insurance claim. On cross-examination, Knipp admitted that Seals made no specific threats on the recording, nor did he use any full names. Seals also told Knipp twice that he might change his mind.

The police sent another informant, Shannon Helton, to record Seals. Helton testified that he was facing a potential ten to fifteen-year sentence on drug charges that he hoped would be "worked out" in exchange for his assistance. The police also paid him $400. He was equipped with a recording device and put in a jail cell with Seals for several hours. He learned that Seals had a list of twenty to thirty people that he wanted to get rid of. Seals told Helton he was going to use his ability to obtain narcotics, or his Social Security back pay, to get someone to shove a hose up these people's rectums, insert barbed wire and then pull out the hose. Seals told Helton that the reason he was in jail was because his ex-wife was performing sexual favors for Ward and Judge Yoakum. Seals said his ex-wife was one of his major problems and he wanted to get someone to take her out into the woods to eliminate his problems. Helton testified that of the people Seals talked about, he mentioned the judge (referring to him as the "county judge executive"), the county attorney, and his ex-wife.

Detective Jim Whitaker of the Kentucky State Police, who headed the investigation, testified that he interviewed several individuals who had been in a cell with Seals, including one who had been in jail with him for eighty-five days. None provided any information about any threats made by him.

Defense witness Timothy Cole, a cellmate of Seals for two months, testified that he never heard Seals threatening his ex-wife, the county attorney, or the judge. Rex Miller, the Bell County Jailer, testified that he listened to phone calls made by Seals but never heard him make any threats.

Detective Whitaker originally arrested Seals on charges of third-degree terroristic threatening, but the charges were dismissed at Ward's request so the prosecution could pursue three felony charges of retaliation against a participant in a legal process, namely Crystal Daniels, Judge Yoakum, and Neil Ward. A jury found Seals guilty of all three charges, and recommended a five-year sentence on the count relating to Daniels, and three years each on the two remaining counts, all to run consecutively. The trial court entered a judgment in accordance with the jury's finding and recommendations. This appeal followed.

Seals argues that his Sixth Amendment right to counsel was violated when the prosecution introduced the recordings made by Helton and Knipp.

> The Supreme Court of the United States has held that the government violates the accused's Sixth Amendment right to counsel when it uses against him a statement "deliberately elicited" from the accused after indictment and in the absence of counsel. In *United States v. Henry*, [447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980)], the Supreme Court applied the rule to jailhouse informants in holding that the government's use of an informant to elicit incriminating information from a defendant after he had been indicted also violated the Sixth Amendment.

McBeath v. Commonwealth, 244 S.W.3d 22, 30 (Ky. 2007).

Seals contends that Helton and Knipp, acting as jail informants, impermissibly elicited incriminating remarks from him when he was without counsel. But, as the trial court correctly ruled, in reliance on *Texas v. Cobb*, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001), the incriminating statements

that Seals made without the benefit of counsel were not related to the charges for which he was being held at the jail, and were therefore admissible.

> The Sixth Amendment right to counsel is "offense specific" and cannot be invoked once for all future prosecutions. . . . [I]f a defendant has invoked his right to counsel with respect to a first offense and is interrogated without counsel with respect to a second offense, any information obtained in that interrogation tending to incriminate the defendant with respect to the first offense must be suppressed, but incriminating statements relating to the second offense are admissible at the trial of that offense.

Thurman v. Commonwealth, 975 S.W.2d 888, 895 (Ky. 1998). The statements Seals made to Knipp and Helton were not used to incriminate him on the contempt of court charge. At the time he made the statements, he had not been charged with retaliating against a participant in a legal process, nor had he invoked his right to counsel on those charges.

The fact that one of the named victims of the retaliation charges was his ex-wife, who was also the subject of the EPO underlying the contempt of court charge, is not sufficient to extend the Sixth Amendment protection to the retaliation charges. This approach, which would suppress evidence "closely related factually" to the currently-charged offense, was expressly rejected by the *Cobb* court, which held that the Sixth Amendment right to counsel may encompass offenses other than those charged, but only those that would be considered the same offense under the *Blockburger* test for double jeopardy. *Cobb*, 532 U.S. at 173, 121 S.Ct. at 1343 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct.

180, 76 L.Ed. 306 (1932)). "Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996), *quoting Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182, 76 L.Ed. at 309 (1932). Contempt of court for violating an EPO (KRS 403.760) and retaliation against a participant in the legal process (KRS 524.055) each require proof of at least one different element. Therefore, the Sixth Amendment right to counsel that may have attached on the contempt of court charge did not extend to the retaliation charge.

Seals also argues that *Cobb* is factually distinguishable from his case, and is thus of no precedential value. Cobb confessed to burglarizing a home, but denied any knowledge of the disappearance of two people from the home. He was indicted for the burglary, and counsel was appointed to represent him. While he was out on bond, he confessed to his father that he had killed the people in the home. His father informed the police, who arrested Cobb. They informed him of his *Miranda* rights, which he waived and confessed to the murders. On appeal, he argued that his confession was obtained in violation of his Sixth Amendment right to counsel, which he claimed had attached when counsel was appointed to represent him in the burglary case.

Seals points out that unlike Cobb, he made his incriminating remarks while incarcerated, the incriminating remarks were made not to a relative but to agents who had a preexisting agreement with the police, and he was not given a

Miranda warning prior to making the remarks. Seals does not explain, however, how these factual dissimilarities affect the applicability of the holding of the *Cobb* opinion. Certainly the *Cobb* court did not state or even imply that its holding was limited specifically to the facts of that case. Under the circumstances, the trial court correctly denied his motion to suppress the incriminating statements.

Next, Seals argues that he was entitled to a jury instruction on third-degree terroristic threatening, the offense with which he was initially charged, as a lesser-included offense of retaliating against a participant in the legal process. We disagree.

A person is guilty of terroristic threatening in the third degree (a Class A misdemeanor) when "[h]e 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. An individual is guilty of retaliating against a participant in the legal process "when he or she engages or threatens to engage in conduct causing or intended to cause bodily injury or damage to the tangible property of a participant in the legal process or a person he or she believes may be called as a participant in the legal process in any official proceeding or because the person has participated in a legal proceeding[.]" KRS 524.055.

Seals acknowledges that third-degree terroristic threatening is not a lesser included-offense of retaliating against a participant in the legal process under a strict statutory elements approach (such as that used in the *Blockburger* test for

double jeopardy), but points out that this approach was rejected by the Kentucky Supreme Court because it "may deprive a defendant of an opportunity for a desired lesser-included offense instruction because of differences in statutory elements even where the defendant is willing to concede that additional elements of uncharged offenses are not really at issue in the case." *Hall v. Commonwealth*, 337 S.W.3d 595, 607 (Ky. 2011) (footnotes omitted).

One of the key differences in the proof between the two statutes at issue is the identity of the victims. Seals never contested the fact that the alleged victims were participants in the legal process. Thus, in order to find Seals guilty of third-degree terroristic threatening, the jury would have to have found that he made threats to cause death or serious physical injury, which is more serious than the retaliation statute's requirement of causing or intending to cause bodily injury. Even if the jury did find Seals guilty of the more serious level of threat, it would nevertheless have been illogical to find him guilty of third-degree terroristic threatening because the jury would have had to ignore the overwhelming proof that the alleged victims were participants in the legal process. Under the circumstances, the trial court did not err in refusing to give this instruction.

Thirdly, Seals asks for palpable error review of the trial court's decision to add a sentence to the statutory definition of the term "threat" in the jury instructions. "[A]ssignments of error in 'the giving or the failure to give' an instruction are subject to RCr [Kentucky Rules of Criminal Procedure] 9.54(2)'s bar on appellate review, but unpreserved allegations of defects in the instructions

that were given may be accorded palpable error review under RCr 10.26." *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013). RCr 10.26 permits unpreserved error to be reviewed if it affected "the substantial rights" of a defendant and resulted in "manifest injustice." To rise to the level of palpable error, there must be a "defect in the proceeding" which is "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

At the request of the defense, the term "threat" was defined in the instructions in accordance with KRS 524.010(8) as "any direct threat to kill or injure a person protected by this chapter or an immediate family member of such a person. Persons protected by this chapter include persons who have been elected or appointed but have not yet taken office." The trial court added the following statement: "Nothing in the definition provided . . . requires that the threat actually be communicated directly to the person being threatened." The trial court acted in reliance on *Rankin v. Commonwealth*, 265 S.W.3d 227 (Ky. App. 2007), a case in which the defendant was found guilty of intimidating a participant in a legal process after he telephoned the grandmother of his accomplice to a burglary and threatened a "drive-by" when she refused to call the accomplice to the phone. The Court concluded that the comment made to the grandmother was sufficient to constitute a threat to a "participant" even though it was not made directly and personally to the accomplice because "it was not unreasonable for a jury to conclude that the threat of a 'drive-by' was directed at [the accomplice] as well."

Rankin, 265 S.W.3d at 233. The trial court in the present case explained that it had included the statutory definition of "threat" at defense counsel's request, but added the *Rankin* clarification because the definition could be confusing and misleading to the jury.

"In criminal cases, instructions 'should conform to the language of the statute,' and '[i]t is left to the lawyers to "flesh out" the "bare bones" in closing argument.' " *Wright v. Commonwealth*, 391 S.W.3d 743, 746–47 (Ky.2012) (quoting *Parks v. Commonwealth*, 192 S.W.3d 318, 326 (Ky.2006))." *Crabtree v. Commonwealth*, 455 S.W.3d 390, 413 (Ky. 2014). Seals contends that the inclusion of the definition not only violated Kentucky's "bare bones" approach to jury instructions, but also constituted an incorrect statement of the law because the *Rankin* ruling applies only to the intimidating statute (KRS 524.040), not to the retaliation statute (KRS 524.055).

We are not persuaded that the instruction strayed so impermissibly from the bare bones principle as to constitute palpable error. "[T]he 'bare bones' principle does not, and should not, prevent the law of the case from being presented to the jury." *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012). "At a minimum, . . . '[i]nstructions must be based upon the evidence and they must properly and intelligibly state the law.'" *Wright v. Commonwealth*, 391 S.W.3d 743, 746-47 (Ky. 2012), *quoting Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). In this case, defense counsel asked for the addition of the definition of "threat;" and it was well within the trial court's discretion to decide that the

additional statement would prevent the jury from being misled. Furthermore, there is no indication that the *Rankin* ruling would not apply equally to the retaliation statute, as Seals contends, because the statutory definition of "threat" is the same for both offenses. *See* KRS 524.010(8). The inclusion of the statement certainly did not rise to the level of manifest injustice required for a finding of palpable error.

Seals next argues that he was entitled to a directed verdict on all the charges. "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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991). Seals argues that the evidence against him consisted only of isolated statements of an equivocal nature, made to jail informants who had already gained or stood to gain from their cooperation with the police and prosecution. The jury was made fully aware of this situation, however. "On review, the appellate court should not . . . substitute its judgment of the credibility of the witnesses for that of the jury." *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

Seals also summarizes the evidence in his favor, such as telling Knipp that he could change his mind, that he made no specific threats regarding Ward or Yoakum, and that the testimony of Timothy Cole and the jailer reflected that neither heard Seals make any threats whatsoever. "The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses

testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence." *Suttles* at 426. Although Seals's threats against Daniels were more pointed, he also mentioned Ward and Yoakum as part of the larger group of over thirty people he threatened.

Finally, Seals argues that he had neither the means nor the opportunity to carry out his threats. But evidence at trial showed that he spoke to the informants about arranging to pay an accomplice with drugs or with his Social Security settlement. It was not unreasonable in light of this evidence for the jury to conclude that he was guilty; and the trial court properly denied his motion for a directed verdict.

The Bell Circuit Court judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky