RENDERED: August 14, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 97-CA-0047-MR

SHAWN D. THORNTON — APPELLANT

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE RAY CORNS, SPECIAL JUDGE
ACTION NO. 96-CR-0023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

* * * * * * *

BEFORE: ABRAMSON, DYCHE, and HUDDLESTON, Judges.

ABRAMSON, JUDGE: Shawn D. Thornton appeals from his conviction of facilitation to theft by unlawful taking over $300 and the resulting five-year sentence and $1,000 fine. On appeal, Thornton claims that the trial court committed reversible error when it (1) permitted prejudicial rebuttal evidence to be admitted against him; (2) imposed a fine of $1,000 against him; and (3) assessed court costs against him. Having reviewed the

record and the applicable law, we affirm in part, reverse in part and remand for re-sentencing.

In 1994, in return for immunity from prosecution, Patrick Goins and Mark Harley admitted to Shelby County authorities that they had committed numerous burglaries and thefts, including the theft of two Ford farm tractors in 1992 from an Owen County farm. After both men implicated Thornton in the tractor thefts, he was indicted and tried in November 1996. At trial, the tractors' owners testified that the tractors disappeared in 1992 and that Thornton was not authorized to take them. Goins and Harley further testified that Thornton approached them to assist in the theft of the tractors for the benefit of Thornton's cousin, Anthony Wentworth. Through the testimony of a Shelby County deputy sheriff, the Commonwealth established that one of the tractors was found on Wentworth's farm in April 1996.

Thornton testified, maintaining his innocence of the tractor thefts. He also stated that Goins was lying about Thornton's participation in the thefts because he and Goins had "fallen out" after Goins had stolen a gun from Thornton's home. Thornton claimed that he had first learned about the theft of his gun when he saw an acquaintance named Jimmy Dean with the gun. Thornton's trial counsel had obtained the trial court's permission to pursue this line of questioning in order to demonstrate that Goins had a reason to lie about Thornton's participation in the thefts. In rebuttal, Goins not only denied

stealing the gun, but he further claimed that he had brokered the sale of the gun to Dean for Thornton in return for a small amount of marijuana which was for Thornton. Thornton's trial counsel did not object to Goins's testimony.

Thornton's first claim is that, even though the issue of admissibility of evidence regarding the alleged sale of the gun to Dean was unpreserved for appellate review, it was palpable error under RCr 10.26 for the trial court to permit the jury to hear Goins's rebuttal testimony. Thornton concedes that his trial counsel failed to object to Goins's testimony. In Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996), the Kentucky Supreme Court defined palpable error as

> one which affects the substantial rights of a party and relief may be granted for palpable error only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

We find no error or resulting manifest injustice to Thornton from Goins's rebuttal testimony.

A trial court has wide latitude in determining the admissibility of rebuttal evidence. Copley v. Commonwealth, Ky., 854 S.W.2d 748 (1993). The Commonwealth correctly argues that Thornton's counsel "opened the door" for Goins's testimony by asking his client questions about Goins's motive in accusing Thornton of the tractor thefts. After Thornton testified that

Goins had burglarized his house and had stolen his gun which then found its way into Jimmy Dean's possession, the trial court properly permitted Goins to testify on rebuttal that Dean had obtained the gun when Goins had brokered a deal for the gun between Thornton and Dean, with marijuana as the purchase price. Thornton suggests on appeal that Goins's rebuttal should have been limited to a denial that he burglarized Thornton's home and a denial that the two had a "falling-out." This carefully circumscribed testimony would obviously preclude any explanation of how Thornton's gun came into the possession of Jimmy Dean. We find no basis for so limiting the rebuttal.

In Copley our Supreme Court found no abuse of discretion in admitting rebuttal evidence after the defendant "opened the door." In that case Copley was convicted of first-degree manslaughter in the shooting death of his former girlfriend's current boyfriend. During Copley's case-in-chief he testified in great detail as to earlier incidents involving the girlfriend, the victim and himself. Significantly, Copley denied that on an earlier occasion he had shot a gun through the open window of a car occupied by the victim, the girlfriend and her son. Our Supreme Court held that it was proper for the Commonwealth to present rebuttal evidence after "Copley opened the door" on this particular incident. 854 S.W.2d at 752.

The Copley case is noteworthy because the victim died when Copley shot him through the open window of a parked car in which the girlfriend was a passenger, a deadly repeat of the

earlier incident which Copley had expressly denied. Clearly the rebuttal evidence in Copley was far more prejudicial than that involved in this case. Thornton's argument is that the jury would think that a defendant who caused a third party to sell a gun in exchange for marijuana would most likely also be willing to steal two farm tractors. This connection is tenuous at best. Moreover, the evidence admitted does not approach the level of potential prejudice present in cases where admission of rebuttal evidence was deemed reversible error because its prejudicial effect outweighed its probativeness. See Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988) (highly inflammatory rebuttal evidence improper even though defense had opened the door). "Having opened the book on the subject," Thornton was not in a position to complain when his adversary "sought to read other verses from the same chapter and page." Harris v. Thompson, Ky., 497 S.W.2d 422, 430 (1973). See, Howard v. Commonwealth, Ky., 447 S.W.2d 611 (1969).

In short, Thornton's testimony about Goins's reasons for accusing him of complicity in the thefts as well as Goins's testimony denying Thornton's allegations were both relevant to the existence or nonexistence of an ulterior motive by Goins in accusing Thornton. See KRE 401. Having allowed Thornton to offer his explanation for Goins's accusations against him, the Commonwealth was entitled to present its point-by-point rebuttal of Thornton's claim and to offer its witness's version of how the

gun came into Dean's possession. The trial court did not abuse its discretion when it allowed Goins's rebuttal testimony.

Thornton's second claim is that the trial court erred when it included a $1,000 fine along with his five-year sentence. We disagree. KRS 534.040(4) provides that a fine "shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." A "needy" or "indigent person" is defined in relevant part in KRS 31.100(3)(a) as "a person, eighteen (18) years of age or older . . . who at the time his need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation." In the typical case, when counsel is appointed for an indigent defendant, the same counsel represents the defendant through sentencing. In that circumstance, a fine would violate the explicit language of KRS 534.040.

Here, on September 25, 1996, the trial court ordered the appointment of trial counsel for Thornton after reviewing his affidavit of indigency. Following his conviction on November 25, 1996, though, the trial judge excused the attorney who had been appointed for trial and granted Thornton's motion to substitute counsel. Retained counsel appeared with Thornton for sentencing on December 17, 1996, when the sentence of five years and a fine of $1,000 was imposed. At the time the sentence was imposed on Thornton, the trial court no longer regarded him as an indigent pursuant to KRS Chapter 31 and therefore Thornton was subject to

being fined by the trial court. Notably, the trial court imposed the minimum fine set by statute. KRS 534.030(1).

Thornton's third claim is that the court illegally assessed court costs of $65.50 against him. We agree. KRS 31.110(1)(b) provides that the court "in which the [needy] defendant is tried shall waive all costs." The costs were incurred for the proceedings leading up to and including the trial, during which Thornton had previously been deemed a needy person under KRS Chapter 31 and was always represented by appointed counsel. We believe that imposition of court costs against Thornton under these circumstances violated KRS 31.110(1)(b).

For the reasons stated, we affirm in part, reverse in part, and remand this case to Owen Circuit Court for further proceedings consistent with this opinion.

HUDDLESTON, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN PART AND DISSENTS IN PART. I would affirm in entirety the trial court's judgment.

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