

Commonwealth Of Kentucky

Court Of Appeals

NOS. 1998-CA-000626-MR
and 1998-CA-000875-MR

VICTOR McLANE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 97-CR-322

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of first-degree assault and contempt of court. Upon consideration of appellant's arguments in light of the record herein and the applicable law, we affirm.

On May 28, 1997, appellant, Victor McLane, shot Roger Matthews twice, causing him serious physical injury. The evidence regarding the events leading up to the shooting was conflicting. Matthews testified that as he walked past the door to appellant's apartment, appellant sprayed him with mace for no reason. As he started to take off his shirt to throw it in the garbage, appellant shot him in the chest. Matthews admitted

having the garbage can lid in his hand at the time, but denied that he tried to hit appellant with it.

Appellant testified that on the day of the incident, Matthews and a female friend, Tonya Morris, who did not get along with appellant, knocked on appellant's door. When appellant did not answer, he saw Matthews try the door. According to appellant, Matthews threatened appellant's family and indicated that he had a weapon. Appellant stated that he was scared that Matthews would get in his apartment. Appellant testified that at some point, Matthews tried to come in appellant's door and appellant sprayed him with mace from his doorway. Matthews then went out to the street to take off his shirt. At that time, he bent down in such a way as to make appellant believe he had a gun. Matthews then picked up a trash can lid as a shield to the mace and charged up to appellant's door. Appellant stated that he could not see what was in Matthews's hand. Appellant then shot Matthews. When Matthews threw the trash can lid at appellant, appellant shot him again. Appellant testified that he never left the threshold of his door.

Four other witnesses who saw the shooting testified that Matthews was not moving toward appellant at the time appellant shot Matthews. According to Matthews and one other witness, appellant fired the second shot in Matthews's back as Matthews turned and began to run away from appellant.

At trial, appellant was represented by appointed counsel who appellant expressed dissatisfaction with throughout the trial. Thus, appellant insisted on additionally representing

himself at trial. Unfortunately, this resulted in constant outbursts and interruptions by appellant which demonstrated his disobedience and disrespect to the court. The court finally cited appellant for contempt during the trial.

The jury found appellant guilty of first-degree assault and sentenced appellant to fifteen (15) years' imprisonment. In addition, the court sentenced appellant to six (6) months on the contempt conviction, to be served consecutively. From these convictions, appellant now appeals.

Appellant first argues that the court erred to his substantial prejudice by allowing evidence of two incendiary devices found in appellant's apartment to be admitted into evidence. The first time any mention of the bombs was made to the jury was in appellant's pro se opening statement. Appellant stated that the Commonwealth and the press had alleged things about him that were not true. Appellant went on to say that it was a lie that the police had confiscated two bombs and a Molotov cocktail from his apartment as alleged in a newspaper article.

In the Commonwealth's case in chief, the Commonwealth questioned Officer Lon Cook about what the police found when they searched appellant's apartment. Cook responded that in appellant's bathroom cabinet they found two bottles containing what appeared to be accelerants with wicks stuck inside. Appellant's counsel objected on grounds that the bombs were not used in the commission of the assault for which appellant was being tried, thus, they were not relevant. The Commonwealth argued that the evidence was relevant to appellant's claim of

self-defense to show that appellant was a violent person. The court overruled the objection and allowed the evidence of the homemade bombs. Besides the testimony of three police officers regarding the bombs, the Commonwealth offered into evidence photos of the bombs. Appellant then moved the court to require the Commonwealth to bring in the actual bombs as the best evidence. The court sustained the motion, and the actual bombs were brought in and admitted as evidence.

During appellant's testimony as the last defense witness, appellant requested that he be allowed to testify further about the bombs and asked for some water so that he could return the bombs to their original condition (the police had removed the accelerant). Thereafter, during a bench conference, the court decided that the bombs were not relevant and that the jury would be admonished to disregard the evidence of the bombs. The court gave the admonishment and allowed no further testimony or evidence regarding the bombs.

Appellant maintains that the evidence of the bombs was evidence regarding appellant's character which was inadmissible under KRE 404. KRE 404(a)(1) provides in pertinent part that "[e]vidence of a pertinent character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except...[if it is] [e]vidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same." In our view, when appellant brought up the issue of the bombs in his opening statement wherein he stated that the

police had lied about confiscating bombs from his apartment, he opened the door regarding this character evidence, and the prosecution was entitled to bring in their evidence regarding the bombs. See Holbrook v. Commonwealth, Ky., 813 S.W.2d 811 (1991), overruled on other grounds by Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998). Appellant was essentially making claims denying his violent character in his opening statement which, under KRE 404, the Commonwealth was entitled to rebut.

Appellant next argues that the court erred when it prevented appellant from explaining that the alleged bombs were actually tools for working on his car. When the court disallowed the appellant from testifying further about the bombs, appellant did not offer the evidence by avowal. Hence, this issue was not properly preserved, as we have no way to judge whether the refusal to allow the evidence was reversible or harmless error. Sholler v. Commonwealth, Ky., 969 S.W.2d 706 (1998); RCr 9.52. We would also note that appellant had the opportunity to cross-examine all the witnesses who testified about the bombs. Finally, we cannot forget that appellant got the benefit of an admonition which, given our decision relative to the evidence of the bombs, the court was not required to give.

Appellant's third argument is that the court erred when it failed to sustain appellant's motion to dismiss a juror who had been convicted of a felony. After the trial had commenced, it was discovered that Juror Brown had been convicted of a felony. During an in-chambers hearing, the juror in question reported that he had been convicted of a felony in Kentucky in

1992, but that in 1997, the Governor of Kentucky had pardoned the juror for the crime. The following day, Juror Brown brought in a certificate issued by Governor Paul Patton which stated that "all civil rights lost by reason of conviction of a felony" and "all the rights of citizenship denied him in consequence of said judgment of conviction" were restored to Brown. An attached order specifically stated that the Governor, acting under the authority of Section 145 and 150 of the Kentucky Constitution, had restored Brown's right to vote and to hold public office, but not the right to receive, possess, or transport a firearm. However, neither document specifically stated the word "pardon".

KRS 29A.080(2)(f) states that a prospective juror is disqualified to serve on a jury if he has been previously convicted of a felony and "has not been pardoned by the Governor or other authorized person of the jurisdiction in which he was convicted." Appellant argues that the restoration of Brown's civil rights was not a pardon. The trial court found that the restoration of civil rights was a limited pardon sufficient to allow Brown to serve on a jury. We agree. We recognize that there is a difference between a pardon granted pursuant to Section 77 of the Kentucky Constitution and a restoration of civil rights granted pursuant to Section 145 and 150 of the Kentucky Constitution, see Leonard v. Corrections Cabinet, Ky. App., 828 S.W.2d 668 (1992). However, we believe that because the restoration of civil rights specifically restored Brown's right to vote, which is one way of becoming eligible for jury service in Kentucky under KRS 29A.040, and because it stated that

it restored "all civil rights lost by reason of conviction of a felony", it essentially pardoned Brown for the purpose of serving as a juror. Accordingly, the trial court properly denied appellant's motion to dismiss the juror.

Appellant's final argument is that the trial court erred in ordering his sentence on the contempt conviction to run consecutively with the assault conviction. Appellant maintains that since the contempt conviction was a misdemeanor, under KRS 532.110(1)(a), the sentence must run concurrent with the felony assault conviction. In reviewing the record, we see that this issue was never raised before the trial court. Thus, it was not preserved for our review. Woods v. Commonwealth, Ky. App., 712 S.W.2d 363 (1986).

For the reasons stated above, the judgment of the Kenton Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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