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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001019-MR

BILLY AKERS — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 01-CR-00234

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a judgment convicting appellant of first-degree stalking, fourth-degree assault, and two counts of second-degree unlawful imprisonment. Due to a discovery violation and error with regard to the jury instructions on the misdemeanors, we vacate the convictions for second-degree unlawful imprisonment and fourth-degree assault. However, we affirm the conviction for first-degree stalking.

Accordingly, we affirm in part and vacate in part and remand the matter for further proceedings consistent with this opinion.

On June 13, 2001, Ranie Akers and her fifteen-year-old daughter, Melissa, returned home from running errands at around 7:00 p.m. When they arrived, Ranie's husband, appellant, Billy Akers (who was not Melissa's father) was there. Some months earlier, Ranie had obtained an emergency protective order against Billy as a result of an incident wherein he choked her, threw her on a bed, and threatened her life. The order mandated that Billy refrain from further acts of violence, have no firearms in the home, and stay 1,000 yards away from Ranie. Subsequently, however, Ranie asked the court to drop the requirement that he stay 1,000 yards away from her so they could try to make the marriage work, which the court granted.

Upon arriving home on the evening in question, Melissa tried to use the telephone. When the phone did not work, she asked Billy about it. He replied that he had had the telephone unhooked. An argument then ensued between Ranie and Billy during which Ranie noticed a gun sitting beside Billy. Thereupon, Ranie fled the trailer with Billy giving chase. Ultimately Billy caught up with Ranie who was hiding behind a truck. According to Ranie, Billy then grabbed her by the arm and the hair and drug her across the gravel driveway back to the house. All the while, her left leg was scraping on the gravel

which caused abrasions to her knee. After throwing Ranie inside the trailer, Billy went looking for Melissa. According to Melissa, who was pregnant at the time, when Billy caught up to her, he hit her in the head with the butt of the gun several times and after dragging her by the hair back to the trailer, repeatedly banged her head against the side of the trailer.

At that point, Billy had Melissa and Ranie sit on opposite ends of the couch while he sat at the kitchen table with his gun. When it got dark, Billy instructed Melissa and Ranie to go to the bedroom where he handcuffed them together to the entertainment center. When Ranie had to use the bathroom, he allowed her to do so but watched and made sure that Ranie and Melissa remained handcuffed together. After using the bathroom, Billy handcuffed the two to the chest of drawers, after which he tried to handcuff them to the foot of the bed. When that would not work, he again handcuffed them to the chest of drawers. Billy eventually allowed Ranie and Melissa to lay on the bed handcuffed together where they stayed for the rest of the night. During the night, Billy told Melissa and Ranie that he was going to kill them and gave them detailed accounts of the various ways he proposed to do so (putting Melissa in the trunk of the car and having Ranie drive over a cliff, handcuffing them to a tree and shooting them, and handcuffing them to an axle under the trailer and burning it down). According to Melissa and Ranie,

they could not escape during the night because Billy was asleep in the hallway in front of the bed with his gun and they could not get past him.

In the morning, Billy got up and put the gun in his truck. He then came back in the trailer, stood against the closet door and cried, stating that his heart hurt. Ranie told him that he would have to undo her handcuffs if he wanted her to help him. At that point, Billy unlocked the handcuffs and let Melissa and Ranie go. Billy then got a shower while Melissa and Ranie packed an overnight bag for Billy to go to the hospital. The three next proceeded to the hospital. At the hospital, Ranie signed a registration form for Billy, left the overnight bag with hospital employees, and left with Melissa. According to Ranie, upon leaving the hospital, she stopped at a pay phone to call 911 but did not have any money, so she could not make the call. Ranie and Melissa then proceeded directly home. Upon arriving at the trailer, they were greeted by Kentucky State Trooper Kevin White who was there on a welfare check because Ranie had not made it to work that day. Ranie and Melissa then told Trooper White about the events of the preceding evening.

Billy was indicted on two counts of unlawful imprisonment in the first degree, one count of assault in the fourth degree, and one count of stalking in the first degree. Pursuant to a jury trial, he was found guilty of two counts of

second-degree unlawful imprisonment, one count of fourth-degree assault, and one count of first-degree stalking. He was sentenced to twelve months on each count of second-degree unlawful imprisonment, nine months on the fourth-degree assault conviction, and four years' imprisonment on the first-degree stalking conviction. All sentences were to run concurrently for a total of four years' imprisonment. This appeal by Billy followed.

Billy's first argument is that the trial court erred in failing to grant his motion for a mistrial based on a discovery violation by the prosecution. At trial, Trooper White testified on direct regarding the injury to Ranie's knee that he observed on the day after the incident. He stated that he saw gravel marks and little indentations on Ranie's leg that day. On cross-examination, defense counsel attempted to impeach that testimony by presenting him with the uniform offense report completed by Trooper White in which he checked the box labeled "no injury". Trooper White pointed out that said report was for the offense of unlawful imprisonment and that he had most assuredly indicated the presence of an injury either on a wound report for the assault charge or in the uniform offense report for the assault charge. At that point and at the close of the Commonwealth's case-in-chief, defense counsel moved for a mistrial on grounds that the Commonwealth had committed a

discovery violation by failing to provide him with this witness statement. Defense counsel argued that its entire defense was that there was no physical proof of the incident in question (which was consistent with the one uniform offense report it received from the Commonwealth) and that Trooper White's testimony regarding the existence of Ranie's injury essentially stripped him of this defense. The prosecution countered that it was unaware of and never had the documents referred to by Trooper White. However, the prosecution conceded that it was nevertheless required to provide those documents to the defense if they existed. The trial court denied the motion for mistrial, reasoning that the defense could not show that it had been prejudiced by the failure to provide the police reports at issue.

At some point, the Commonwealth offered as supplemental exhibits in the case six photographs of Ranie's claimed injuries and the uniform citation reports for the other charged offenses besides the unlawful imprisonment charge, including the report for the fourth-degree assault charge which indeed contained a check next to the box labeled "apparent minor injury". Apparently, these photographs and reports were in the possession of the police and had not been provided to the prosecution or defense counsel prior to trial. We would note

that the photographs were of poor quality and showed very little in the way of injury to Ranie.

Prior to trial, a general discovery order was entered requiring the Commonwealth to provide the defense with, among other things, any exculpatory evidence. In addition, RCr 7.26(1) provides:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such a statement shall be made available for examination and use by the defendant.

The uniform citation report for the fourth-degree assault charge constituted a discoverable witness statement in this case under the above rule since it clearly related to the subject matter of Trooper White's testimony and was signed by Trooper White. See Maynard v. Commonwealth, Ky., 497 S.W.2d 567 (1973). Thus, it should have been made available to defense counsel. The question now is, was the defense prejudiced by this discovery violation such that it constituted reversible error? See McRay v. Commonwealth, Ky. App., 675 S.W.2d 397 (1984).

Billy argues on appeal, as his defense counsel did below, that the failure to provide the document at issue denied him the ability to adequately prepare a defense and undermined the defense that was presented. Billy points to his counsel's opening statement wherein he emphasized the fact that there was no physical evidence of the crime, in particular, no evidence of any injury. Defense counsel argued that the case was therefore essentially a swearing match between the victims and Billy. Upon review of the trial, we see that the defense theory of the case at trial was that the incident described by the victims did not occur at all. Billy testified in his own defense that although he and Ranie got into an argument on the evening in question, no physical altercation occurred.

We agree that Billy was prejudiced by the Commonwealth's failure to provide him with the uniform offense report on the fourth-degree assault charge with regard to his defense of the assault charge (KRS 508.030) since proof of an actual injury was an element of the crime. Indeed, the evidence as to whether Ranie sustained a physical injury would have been critical to preparation of the defense to the assault charge. Hence, we must vacate the fourth-degree assault conviction.

However, as to the stalking (KRS 508.140; KRS 508.150) and unlawful imprisonment charges (KRS 509.020; KRS 509.030), we do not believe Billy was prejudiced by the discovery violation

since an actual injury was not required for proof of those offenses. We reject Billy's claim below that the discovery violation affected his defense of the whole case (all of the charges) because the lack of injury discredited the victims' testimony and tended to show that the entire incident did not occur. We would point out that the evidence of the other offenses, even in the absence of any evidence regarding the physical injury to Ranie, was overwhelming.

Billy's next argument is that the trial court erred in failing to excuse for cause a juror who worked for the County Attorney's office and a juror who had been represented in a civil matter by an attorney from a law firm where an attorney for the Commonwealth had been formerly employed. As to the latter juror, defense counsel failed to ask that the juror be stricken for cause. Hence, any error related to this juror was waived. RCr 9.36.

During voir dire, potential juror Delia Lucas informed the court that she presently worked for the Pike County Attorney's office, although she did not specify what her position was in that office. Upon further examination of Lucas, it was learned that she now works in the child support division, but formerly worked in the criminal division. When asked if she was in any way familiar with the case at hand, she replied that she was not and further that she had been on maternity leave

from her job from April 2001 through August 2001. It was determined by the trial court that the case would have been in district court during that time period. Defense counsel moved to have Lucas stricken for cause, citing an implied bias by virtue of her employment with the County Attorney's office. The trial court denied the motion, reasoning that the Commonwealth Attorney and the County Attorney are two distinct offices and it was the Commonwealth Attorney who was trying the case. Subsequently, defense counsel renewed his motion, noting that he had used all of his peremptory challenges, one of which was on Lucas.

It has been held that an Assistant County Attorney has an implied bias in a criminal case in circuit court "because his position as a prosecutor for the Commonwealth gives rise to a loyalty to his employer." Farris v. Commonwealth, Ky. App., 836 S.W.2d 451, 455 (1992), overruled on other grounds by Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998). Likewise, a former County Attorney who held said position at the time of the preliminary hearing in the case was determined to have an implied bias in the case in circuit court and, thus, should have been stricken for cause. Godsey v. Commonwealth, Ky. App., 661 S.W.2d 2, 4-5 (1983). It has further been held that a secretary for the Commonwealth Attorney's office had an implied bias in a case being prosecuted by said office because of her loyalty to

her employer and the fact that she was in a position to have known about the case prior to trial. Randolph v. Commonwealth, Ky., 716 S.W.2d 253 (1986), overruled on other grounds by Shannon v. Commonwealth, Ky., 767 S.W.2d 548 (1988).

In the present case, we agree with appellant that Lucas had an implied bias and, thus, should have been stricken for cause. Although she was on maternity leave when the County Attorney was prosecuting the case at the district court level, she nevertheless had a loyalty to her employer who had prosecuting authority over the matter at one time. However, despite the fact that the defense used all of its peremptory challenges in this case, Billy failed to demonstrate that the use of the peremptory challenge on juror Lucas "resulted in a subsequent inability to remove further unacceptable jury panel members." Farris, 836 S.W.2d at 455, (quoting Smith v. Commonwealth, Ky., 734 S.W.2d 437, 444 (1987), cert. denied, 484 U.S. 1036, 108 S. Ct. 762, 98 L. Ed. 2d 778 (1988) and Rigsby v. Commonwealth, Ky., 495 S.W.2d 795, 799 (1973), overruled on other grounds by Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985)). In fact, defense counsel expressed no objection to any other jurors. Hence, we do not adjudge that the error was reversible.

Billy's next assignment of error relates to a comment made by the prosecution during closing argument referring to

Billy as a dangerous man. Billy maintains that this comment was evidence of his future dangerousness which was in violation of KRE 404. In our view, the prosecution's reference to Billy as a "dangerous man" was not character evidence pursuant to KRE 404(a) which provides that evidence of a person's character is not admissible "for the purpose of proving action in conformity therewith." In the instant case, the prosecution was not referring to Billy's known dangerous character for the purpose of proving that he committed the offenses at issue or to warn of Billy's future dangerous propensity. Rather, he was simply commenting on the evidence presented in the case, evidence which, indeed, showed Billy to be a dangerous man. Accordingly, the prosecution's remarks in question did not constitute error.

Billy's fourth claim of error is that the jury instructions on the stalking charge failed to require the jury to specify which of the alternate elements in KRS 508.140(1)(b) they relied on in finding him guilty of first-degree stalking. Billy contends that failing to have the jury specify which element(s) it relied on may have resulted in the verdict not being unanimous.

Billy concedes that this alleged error was not preserved for review. Nevertheless, he urges us to review the issue under the palpable error rule, RCr 10.26.

In Halvorsen v. Commonwealth, Ky., 730 S.W.2d 921 (1986), our Supreme Court was faced with the same issue relative to a murder instruction which did not require the jury to specify which defendant was the principal and which one was the accomplice. The Court stated, "A verdict cannot be attacked as non-unanimous where both theories are supported by sufficient evidence." Id. at 925.

In the instant case, the instruction for first-degree stalking required the jury to find that when Billy stalked Ranie, he either:

> (1) Knew that a protective order had been issued against him by the Pike Family Court to protect Ranie Akers from such conduct;
>
> Or
>
> (2) Had a deadly weapon on or about his person.

The evidence in the case established the existence of both elements – that Billy knew a domestic violence order had been entered forbidding him from committing any further acts of violence against Ranie and that he had a gun on or about his person – when Billy was stalking Ranie. Accordingly, the stalking instruction as given was not in error.

Billy's remaining argument is that the jury instructions improperly gave the penalty range for all of the charged misdemeanor offenses in violation of KRS 532.055(1). In

the recent case of Commonwealth v. Philpott, Ky., 75 S.W.3d 209 (2002) (decided on May 16, 2002, some three months after the trial in the instant case), our Supreme Court confirmed that informing the jury of the penalty range for any misdemeanor tried with a felony, either as a lesser included offense or as a primary offense, violates the truth-in-sentencing statute (KRS 532.055(1)).

Billy concedes that this alleged error was not preserved. However, we recognize that Philpott had not been decided at the time of the trial, thus, knowledge of its holding could not be imputed to Billy's counsel at that time. Further, since the case at hand was not yet final at the time Philpott was decided, its holding is to be applied retroactively. Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Accordingly, we vacate the two convictions for second-degree unlawful imprisonment and cite this issue as additional grounds for vacating the conviction for fourth-degree assault (vacated above due to discovery violation).

For the reasons stated above, the judgment of the Pike Circuit Court is affirmed in part (as to the first-degree stalking conviction) and vacated in part (as to the second-degree unlawful imprisonment and fourth-degree assault convictions) and the matter remanded for further proceedings consistent with this opinion.

GUIDUGLI, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: The majority opinion vacates the misdemeanor convictions but affirms the felony stalking conviction. I agree that the misdemeanor convictions should be vacated, but the felony stalking conviction should also be vacated in my opinion. Thus, I concur in part and respectfully dissent in part.

The majority concluded in its opinion that Juror Lucas should have been stricken for cause. I agree. However, the majority further states that this was not reversible error, even though Akers had used all his peremptory challenges, because he did not demonstrate that there was an inability to remove further unacceptable jurors. I must respectfully but strongly disagree with this portion of the opinion.

As I understand Kentucky law, it is automatically reversible error where the trial court erroneously failed to strike a juror for cause and the defendant had used all his peremptory challenges. This principle was clearly stated by the Kentucky Supreme Court in Thomas v. Commonwealth, Ky., 864 S.W.2d 252 (1993).

Pursuant to RCr 9.40(1) a defendant is entitled to eight peremptory challenges. According to our supreme court in

the Thomas case, "a defendant has been denied the number of peremptory challenges procedurally allotted to him when forced to use peremptory challenges on jurors who should have been excused for cause." Id. at 259. This principle has been reaffirmed by our supreme court in numerous cases since the Thomas case. For example, in Furnish v. Commonwealth, Ky., 95 S.W.3d 34 (2002), our supreme court held that "[i]f the trial court abuses its discretion by improperly failing to sustain a challenge for cause, it is reversible error because the defendant had to use a peremptory challenge and was thereby deprived of its use otherwise." Id. at 44-45. See also Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 796 (2001).

The majority cites Farris v. Commonwealth, Ky. App., 836 S.W.2d 451 (1992), overruled on other grounds by Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998), and Rigsby v. Commonwealth, Ky., 495 S.W.2d 795 (1993), overruled on other grounds by Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985), to support its position. In the Farris case this court concluded that the trial court abused its discretion by not striking a juror for cause. However, relying on Smith v. Commonwealth, Ky., 734 S.W.2d 437, 444 (1987), this court concluded that the error was harmless because the appellant "did not even attempt to demonstrate that the use of a peremptory challenge on Juror Harrod 'resulted in a subsequent inability to

remove further unacceptable jury panel members.'" Farris, 836 S.W.2d at 455, quoting Smith, supra.

In the Smith case our supreme court held that there was no abuse of discretion by the trial court's refusal to strike for cause six potential jurors who were either connected with law enforcement or had an alleged predisposition to the prosecution. Id. at 444. The court went on to state that forcing Smith to remove the six jurors by peremptory challenges did not require him to use all his peremptory challenges and that he had not demonstrated that the use of the challenges "resulted in a subsequent inability to remove further unacceptable jury panel members." Id., citing Rigsby, supra.

In the Rigsby case the court held that "[a] defendant who fails to exhaust such [peremptory] challenges cannot complain concerning the jury selection." Id. at 498-99. See also Williams v. Commonwealth, Ky. App., 829 S.W.2d 942 (1992), wherein this court held that, in order to prevail on the issue, the appellant had to demonstrate that all his peremptory challenges had been exhausted and that an incompetent juror was allowed to sit who should have been stricken for cause. Id. at 943.

Each of the cases relied upon by the majority were prior to our supreme court's decision in the Thomas case. I believe the Thomas case and the many cases citing it thereafter

clearly hold that it is reversible error where a trial court failed to properly strike a juror for cause and where the defendant used all his peremptory challenges. Therefore, I respectfully dissent from this portion of the opinion and would vacate and remand for a new trial on all charges.

I would vacate the felony stalking conviction for a second reason. The majority concluded that Akers was prejudiced by the Commonwealth's failure to provide him with the Uniform Offense Report on the fourth-degree assault charge. However, the majority concluded that he was not prejudiced by the discovery violation as to the stalking and unlawful imprisonment charges because an actual injury was not required for proof of those offenses. The majority rejected Akers' claim that the discovery violation affected his entire defense. Further, the majority stated that the evidence of guilt was overwhelming even in the absence of any evidence regarding physical injury. I disagree.

Akers' defense was that the incident never occurred. Going into the trial, his attorney hoped to persuade the jury that the incident never occurred because of the absence of any evidence of a physical injury. His attorney even obtained discovery of a document signed or initialed by the trooper in which he had checked the box labeled "no injury." When the undisclosed document came to light at trial, Akers' defense was,

as he stated in his brief, “gutted.” The disclosure of the document destroyed Akers’ attempt to cross examine the trooper based on his notation in the disclosed document that no injury had occurred. Had the trooper confirmed that there was no injury as he had stated in his other report, then the case would have simply been a “he said/she said” case. In any event, the evidence against Akers would not have been overwhelming as stated by the majority. I would vacate and remand for a new trial on all charges on this ground as well.

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