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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001071-MR

ROBERT HIBSHMAN — APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 02-CR-00164

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is a direct appeal from a judgment in which appellant was convicted of extortion over $300, guilty but mentally ill, and possession of a handgun by a convicted felon. Appellant argues that the trial court erred in failing to suppress a book about how to be a hit man and a book about disguises found in appellant's home, and in failing to forward a recusal motion to the Chief Justice. We cannot say that the trial court abused its discretion in allowing the books to be admitted into evidence. As to the motion for recusal, we

adjudge there was no error in failing to forward the motion to the Chief Justice as it was a motion brought pursuant to KRS 26A.015. The remainder of the alleged errors were not properly preserved for review and did not rise to the level of palpable error. Hence, we affirm.

On November 14 or 15, 2002, appellant, Robert Hibshman, left a note on Butch Bloom's shop door asking him to come speak with him about something that was very urgent and important. Butch Bloom is a wealthy, prominent citizen of Powell County, Kentucky. A couple days later, Bloom, accompanied by Mike Lockard, a deputy sheriff in Powell County, visited Hibshman at Hibshman's home. According to Bloom, Hibshman invited them inside and began telling them the following story:

Hibshman stated that sometime between 1986 and 1989 he had been at the bedside of a sick child hospitalized in Florida. Another patient in the same room with the child Hibshman was visiting was the son of Terry Woods, and this child was in need of a bone marrow transplant. According to Hibshman, he donated the bone marrow for this child and the child ultimately recovered.

Hibshman continued that by unusual coincidence, Woods was recently traveling in Breathitt County, Kentucky, when he observed a trailer with "Bandit" painted on the side. Because

“Bandit” was Hibshman’s known nickname, Woods thought the owner of the trailer might be Hibshman. When Woods approached the driver, the driver stated that he had purchased the trailer from Robert “Bandit” Hibshman, who had been diagnosed with cancer and had been experiencing financial difficulties. Hibshman stated that Woods wanted to help him get back on his feet financially, so Woods, who was trained as a sniper in the Army, devised a scheme to get three wealthy men to give Hibshman $1,000,000 a piece. According to Hibshman, if these men did not give Hibshman $1,000,000 by November 22, they would be killed by Woods. Hibshman stated that Woods had picked three wealthy men - Bloom, an unidentified man in Western Kentucky, and a man in Pennsylvania who had already been killed by Woods because he refused to give the money. Hibshman then showed Bloom an obituary for a Pennsylvania man who Hibshman claimed was the man that Woods had killed. Hibshman also mentioned that a man from another state who had a family might possibly be killed if Bloom did not pay the money. When Bloom inquired whether he thought Woods was serious, Hibshman responded that he indeed was and that Woods knew where Bloom lived, the distances between roads to his house, and the garages he used. Hibshman told Bloom that if he did not give the money, he should install bulletproof glass in his pickup truck. Before leaving, Bloom told Hibshman

that he had to think about the situation and that he would get back with Hibshman later.

Bloom thereupon contacted the FBI and described the situation. The FBI told Bloom to contact the Kentucky State Police ("KSP"). KSP Detective Timothy Gibbs interviewed Bloom and decided to conduct a sting operation. Two days later, Detective Gibbs wired Bloom and had Bloom and Lockard pay another visit to Hibshman. During this second meeting, Bloom asked Hibshman if he (Hibshman) could just tell Woods that he had received the money so that Woods would forget about it. Hibshman replied that Woods would want to see the money. Hibshman then stated that he had left a package for Bloom in Bloom's garage. When Bloom returned home, he found a package under his shop door which he promptly delivered to Detective Gibbs. Gibbs opened the package and found a copy of Psalm 143, two thank you notes, two letters and a copy of a trust document which was from a trust Hibshman's parents had set up for Hibshman in 1981. One of the letters appeared to be to Woods asking him to abandon his plan to harm Bloom if he did not give the money. The other letter was to Bloom regarding the trust document. The letter suggested that Bloom may need the trust document in the event he needed to set up a trust for his family. One of the thank you notes was addressed to Terry Woods and stated on the envelope, "Butch if you see him first!?" The

note read, “You owed me nothing but your THANKS! What you are doing is wrong.” The second thank you note was addressed to Bloom and read:

> Thank you for at least giving me the respect of stepping over. I know what I have to do. I hope what I have left will help you. You know if a man can’t work he isn’t a MAN! Much less if he puts others in DANGER! – Can’t Do it!

The note was signed, “Your Friend ‘Bandit’”.

After the second meeting, Detective Gibbs had Bloom remove $5,000 from the bank which Gibbs thereafter photocopied. On November 21, 2002, Bloom was again wired and Lockard and Bloom paid another visit to Hibshman at his house. Bloom offered Hibshman $5,000 and asked if that sum of money would pacify Woods. Hibshman accepted the money, stating that he would see if that would satisfy Woods. Lockard and Bloom then left Hibshman’s house and reported back to Gibbs. KSP officers thereupon went to Hibshman’s house and executed a search warrant and arrested Hibshman for extortion over $300, possession of a handgun by a convicted felon, and possession of drug paraphernalia. During the search, officers seized the $5,000 in cash, a Ruger Mini-14, a Mossbert 20 GA shotgun with pistol grip, a Smith & Wesson .45 automatic, a tazer, ammunition, lock picks, an instruction book on how to commit murder, a book on

disguises, a book about explosives, a book on ordering birth certificates, and various drug paraphernalia.

On December 18, 2002, Hibshman was indicted on the following charges: theft by extortion over $300; possession of a firearm by a convicted felon; possession of burglar's tools; possession of drug paraphernalia; and persistent felony offender in the second degree (PFO II). Hibshman was tried by a jury on April 5 and 6, 2004, and was found guilty of theft by extortion over $300 but mentally ill, and possession of a handgun by a convicted felon. The jury recommended a sentence of five years on the extortion charge and ten years on the possession of a handgun by a convicted felon charge, to be served consecutively. On the same day, Hibshman pled guilty to possession of drug paraphernalia. On May 15, 2004, Hibshman was sentenced to ten years on the possession of a handgun by a convicted felon charge and five years on the extortion charge, to be served consecutively, and twelve months on the possession of drug paraphernalia charge, to be served concurrently with the felony charges, for a total of fifteen years. This appeal by Hibshman followed.

Hibshman's first argument is that the trial court erred in denying his motion to suppress certain books found in Hibshman's house. One of the books was a book on how to commit murder for hire. The cover page for this book had been torn off

so the title of the book was unknown. The other book was called Methods of Disguise, a book on how to disguise oneself for purposes of surveillance or committing a crime. Hibshman argued that since the crime was extortion and not murder or attempted murder, the books on disguise and how to commit murder were not relevant and were highly prejudicial. A suppression hearing was held on March 12, 2004, after which the court stated that it would read the books and take the issue under advisement. On March 31, 2004, the court entered its opinion and order denying the motion to suppress the murder for hire and Methods of Disguise books.

The crime of theft by extortion as relates to the present case is defined in KRS 514.080(a) as intentionally obtaining property of another by threatening to "inflict bodily injury on anyone or commit any other criminal offense . . . ." KRE 401 provides, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under KRE 402, all relevant evidence is admissible unless otherwise provided by statute, the Kentucky Rules of Evidence, the United States or Kentucky Constitution, or by other rules of the Supreme Court of Kentucky. Pursuant to KRE 403, relevant evidence may be excluded "if its probative value is

substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." A trial court's ruling on the admissibility of evidence will not be overturned unless the court abused its discretion. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id. at 581. We believe the trial court's ruling allowing the two books at issue to be admitted into evidence in the present case was not an abuse of discretion, as it was well-reasoned and supported by sound legal principles. Thus, we adopt the following portion of the trial court's order as our own:

> Count I of the indictment charges the defendant with theft by extortion when he obtained $5,000.00 in cash from Butch Bloom by threatening to inflict bodily injury upon him. The commonwealth maintains that the book on being a professional hit man seized as evidence herein contained several highlighted passages which indicate the defendant's preparedness to carry out the threats if he was not paid the money, and that said book is relevant and admissible evidence in the above-styled action. The first paragraph of Chapter 1 states: "[a]s a first class mechanic, you will be an expert in your profession. Becoming an expert entails research – reading, observing and asking questions – as well as development of a wide range of physical abilities and weapons expertise." The

commonwealth contends that when the defendant was arrested he had reading material on disguises, mixing poisons, explosives and a brochure on ordering false identification cards and false birth certificates; and that the defendant had the material to research on becoming a professional killer, which is relevant to the aforementioned charge. Pages 10-11 of said book suggest that a hit man may find employment by reading the local newspapers to find potential employers or victims. It states that someone who has recently been arrested for dealing drugs would be willing to pay to have witnesses eliminated; a politician may pay to eliminate the competition; or a wealthy couple filing for divorce may mean employment by either spouse of someone who offers discrete [sic] professional services. The bottom of Page 18 to the top of Page 19 states, "[T]his book stresses the importance of using disguise and false identification to foil positive identification." The defendant possessed a brochure on ordering false identification cards and false birth certificates. Chapter 2 begins by stating, "[a] hit man without a gun is like a carpenter without a hammer. Not very effective." The defendant was well armed when his residence was searched as a Ruger mini-14 rifle, a shotgun and a semi-automatic pistol was [sic] seized. Page 26 details the disadvantages of using a revolver. For purposes of this section of the book the difference in a fully automatic and a semi-automatic pistol are immaterial. The book states that a revolver will emit powder all over the hands of the shooter. However, an automatic (and the commonwealth submits a semi-automatic) is more tightly sealed so that less powder and less evidence will be on the hands of the shooter. Page 27 suggests that a hit man should own handcuffs, as they may be needed to restrain the mark. The defendant had a handcuff key and admitted to owning two sets of handcuffs

when he was arrested. Pages 28-29 discuss using disguises. The defendant had a book called “Master of Disguise”. Pages 30-32 discuss uninvited entry by use of lock picks. The defendant possessed lock picks when he was arrested. Page 53 discussed the possible need to torture. The defendant had two tazers which would torture anyone subjected to the voltage they produce. Pages 54-55 discuss the use of explosives. The defendant had a manual on explosives. Pages 58-63 discuss the use of poisons, stating, “[P]oison is one of the hit man’s best friends.” The defendant had a manual on poisons. Pages 64-66 discuss how to make a reluctant victim talk. The two tazers could be very persuasive. Pages 71 to the top of Page 81 discuss the need for collecting accurate information on the mark or victim. The defendant knew Butch Bloom was a prominent citizen and a family man; he knew Bloom was married and had children and grandchildren. The defendant[’]s scheme included telling Mr. Bloom that if he didn’t pay the money that not only he, but also possible [sic] someone else in California or Oklahoma, who was also a family man, would be killed. The bottom of Page 83 through the remainder of the chapter discuss the need for surveillance. The defendant stated that Terry Woods knew how far it was from the road to Mr. Bloom’s residence. The commonwealth submits that the defendant had surveilled Mr. Bloom’s property. Chapter 6 is titled “Opportunity Knocks”. It talks about how much a hit man should be paid, and about the expenses associated with the profession. The defendant’s plan was that Butch Bloom would pay him not to be killed. Page 97 discusses the need to give false information. The defendant possessed a brochure concerning false identification. Pages 121-123 discuss false identification.

The commonwealth submits that the book is a how to guide on killing for profit. The commonwealth maintains that the defendant extorted money from Butch Bloom

> under a scheme wherein he would profit from persuading Mr. Bloom that he would be killed if he did not pay. The commonwealth argues that the similarity between the book and the other evidence is not coincidental and it is apparent that he defendant had read the book and had used it in preparation for the extortion. The commonwealth contends that the book is relevant evidence and that its probative value is not outweighed by its prejudicial effect.
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> Based on the foregoing, this court finds and Orders that the defendant's motion to suppress the book on How to Murder/being a professional hit man and the book Master of Disguise is denied. The court finds that the foregoing passages as set forth by the commonwealth are relevant to the pending charge of extortion and that the admission of said evidence is not substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury or by considerations of undue delay or needless presentation of cumulative evidence.

In sum, we agree with the trial court that the ability to carry out the threatened crime, and the evidence of that ability, was highly relevant to the crime of extortion and was not unduly prejudicial. Given the evidence of how prepared Hibshman was to carry out his threat, if the police had not intervened in this case when they did, it is likely that the books would have ultimately been relevant to the actual crime of murder.

Hibshman's next argument is that the trial judge erred when he failed to give notice to the Chief Justice of the Kentucky Supreme Court of Hibshman's motion for recusal. On

March 10, 2004, Hibshman filed a motion for Judge Larry Miller to recuse himself from the case, alleging that Judge Miller and the victim in the case, Bloom, had a close relationship such that Judge Miller's impartiality would be called into question. Specifically, the motion alleged that Judge Miller flew, free of charge, in an airplane owned by Butch Bloom on a fishing trip and that Bloom and Judge Miller were close friends. A hearing on the matter was held on March 12, 2004. At the hearing, Judge Miller denied having any personal relationship with Bloom. Judge Miller stated that the only personal contact he has ever had with Bloom was when Bloom's two sons had divorce cases in Miller's court and he may have seen him outside the courtroom and said, "hello". As to the issue of the plane trip, Judge Miller stated that he once rode on a chartered plane which Bloom owned a one-half interest in, for which flight Judge Miller paid $500. According to Judge Miller, the person who made the transportation arrangements was the other owner of the plane and Miller had no knowledge at the time the flight was booked that Bloom had any interest in the plane. Judge Miller stated that Bloom was not present on that flight and was not present at the destination. The Judge conceded that a complaint had been filed against him with the Judicial Retirement and Removal Commission by another litigant in a separate matter concerning the airplane flight. Judge Miller stated that he had been vindicated in that

matter. The court then denied the motion for recusal, and Hibshman asked for no further relief.

Hibshman argues that under KRS 26A.020, his motion for recusal was required to be forwarded to the Chief Justice of the Kentucky Supreme Court to decide if recusal was warranted. KRS 26A.020(1) provides in pertinent part:

> If either party files with the circuit clerk his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge.

KRS 26A.015(2) provides in pertinent part:

> Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
> (a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;

In Nichols v. Commonwealth, 839 S.W.2d 263 (Ky. 1992), our Supreme Court recognized that the above are two separate remedies when a party is seeking recusal of a sitting judge. KRS 26A.020(1) "allows a complaining party to file an affidavit with the circuit clerk who certifies the facts to the Chief Justice who then reviews the facts and determines whether to

designate a special judge." Id. at 265. KRS 26A.015 relief is sought via a motion filed with the sitting judge seeking to have that judge disqualify himself or herself. Id. The document filed by Hibshman in the present case was styled "motion to recuse and change of venue" and requested that the judge recuse himself. Although the motion alleged facts as support for the motion, the document was clearly a motion for KRS 26A.015 relief asking the sitting judge to rule on the motion and not an affidavit for purposes of having the Chief Justice rule on the recusal under KRS 26A.020(1). Accordingly, the trial court properly ruled on the motion, and there was no error in failing to forward the motion to the Chief Justice.

Hibshman next argues that the Commonwealth failed to sufficiently prove that he had been convicted of a prior felony for purposes of proving the charge of possession of a handgun by a convicted felon. Specifically, Hibshman complains that the document used to prove a prior felony conviction in Florida was only certified by the court clerk in Florida via an embossed seal and was not properly certified by the court pursuant to KRS 422.040. Hibshman admits this argument was unpreserved, as it was never raised before the trial court by way of an objection to the evidence. RCr 9.22. Nevertheless, Hibshman urges us to review the issue for palpable error under RCr 10.26. Palpable error is error that "affects the substantial rights of a party"

and will result in "manifest injustice" if not considered by the court. RCr 10.26. If upon consideration of the whole case, the reviewing court does not conclude that a substantial possibility exists that the result would have been different, the error complained of will be held to be nonprejudicial. Jackson v. Commonwealth, 717 S.W.2d 511 (Ky.App. 1986); Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003). Hibshman does not deny that he was, in fact, convicted of the felony in question in Florida. Accordingly, we cannot say that the alleged error was palpable.

The next assignment of error propounded by Hibshman is in regard to the jury instructions submitted in the sentencing phase. Hibshman maintains that the jury instructions erroneously failed to define the terms "consecutively" and "concurrently" relative to how his sentences should be served. This alleged error was likewise unpreserved with an objection to the instructions or the tendering of the desired instruction. RCr 9.54(2); Fulcher v. Commonwealth, 149 S.W.3d 363 (Ky. 2004). Again, Hibshman asks that we review the matter for palpable error pursuant to RCr 10.26. There is no indication in the record that any juror in this case was confused about the terms "consecutively" and "concurrently" and needed definitions of those terms. Hence, we adjudge there was no palpable error.

Hibshman's final argument is that the trial court erred when it incorrectly instructed the jury on the verdict "guilty but mentally ill." Again, this claimed error was not preserved with an objection or a tendered instruction (RCr 9.54(2)), and Hibshman seeks review under RCr 10.26. The instruction at issue provided:

> If the Defendant is found not [sic] guilty but mentally ill under this Instruction, he will receive a sentence for the offense of which he has been found guilty. However, treatment shall be provided to the Defendant until those providing the treatment determine that such treatment is no longer necessary or until the expiration of his sentence, whichever occurs first.

KRS 504.150 provides:

> (1) The court shall sentence a defendant found guilty but mentally ill at the time of the offense to the local jail or to the Department of Corrections in the same manner as a defendant found guilty. If the defendant is found guilty but mentally ill, treatment shall be provided the defendant until the treating professional determines that the treatment is no longer necessary or until expiration of his sentence, whichever occurs first.
>
> (2) Treatment shall be a condition of probation, shock probation, conditional discharge, parole, or conditional release so long as the defendant requires treatment for his mental illness in the opinion of his treating professional.

According to Hibshman, the jury should have been instructed of the possibility that if the defendant was found guilty but mentally ill, he may not receive any mental health treatment at all, citing Brown v. Commonwealth, 934 S.W.2d 242 (Ky. 1996) wherein the defendant challenged the constitutionality of the guilty but mentally ill (GBMI) verdict. While the Court in Brown was critical of GBMI verdicts in general, the Court stopped short of finding reversible error in a GBMI instruction that parroted the language in KRS 504.150(1) because the record contained insufficient evidence to strike down the GBMI instruction or the GBMI verdict. Id. at 246. The instruction in the present case was identical to the instruction in Brown (absent the clerical error), and Hibshman did not challenge the GBMI verdict or instruction at trial. Hence the instruction was not palpable error.

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

ALL CONCUR.

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