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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000472-MR

JOSEPH L. YOUNG — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 07-CR-00323

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Joseph Lamont Young was convicted of first-degree bail jumping and of being a second-degree persistent felony offender (PFO). He received a sentence of seven years' imprisonment. On appeal, Young argues that: (1) the trial court erred by permitting his defense counsel in the underlying case to

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

provide testimonial evidence about matters protected by attorney-client privilege and (2) prosecutorial misconduct occurred during closing argument. We affirm.

Young was indicted for allegedly receiving stolen property. He was conditionally released from jail on bond. His trial date was set for May 14, 2007, in Hardin Circuit Court. Young did not appear for trial and the court issued a bench warrant for his arrest. The Hardin County Grand Jury indicted Young for bail jumping and for being a second-degree PFO. Following a jury trial, Young was convicted of both charges. This appeal followed.

Young argues that the trial court erred by allowing Young's defense counsel in the underlying case to testify about the attorney-client relationship. Young argues that this testimony violated the attorney-client privilege and that its prejudicial effect outweighed its probative value.

We review a trial court's rulings on the admissibility of evidence under the abuse of discretion standard. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

KRE 503(b) states:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.

KRE 503(a)(5) states:

> A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those

> reasonably necessary for the transmission of the communication.

"Attorneys may testify as to matters affecting a client so long as such matters do not relate to confidential communications." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 548 (Ky. 2004) (quoting *Futrell v. Shadoan*, 828 S.W.2d 649, 651 (Ky. 1992)). "The privilege does not extend to . . . *non-communicative acts*." *Id.,* (quoting Kentucky Evidence Rules Study Commission's commentary to KRE 503). "Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence . . ." *Id*., (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 5.10 at 233 (3d Ed.1993)).

The communication of defense counsel to Young regarding the time, place, and date of his trial is not confidential and is not privileged. Defense counsel was also permitted to testify over objection that: (1) Young failed to attend a scheduled meeting for trial preparation, (2) Young hung up during a telephone conversation regarding trial preparation, and (3) Young failed to return phone calls regarding trial preparation. Young argues that this information was privileged and that the prejudicial impact outweighed its probative value.

The failure to attend meetings, hanging up on telephone conversations, and failing to return telephone calls are non-communicative acts. The substance of any legal advice or confidence was not revealed. Testimony on these matters was merely the "revelation of an act" in which defense counsel

participated and not a confidential disclosure. *St. Clair,* 140 S.W.3d at 548. Moreover, these matters were relevant to show that Young intentionally failed to appear at trial and that his failure to appear was not due to circumstances beyond his control. We are not convinced that the probative value of the evidence was outweighed by undue prejudice. The trial court did not abuse its discretion.

Young also argues that he was prejudiced by the Commonwealth's personal appeals to jurors and references to facts not in evidence during closing argument. These alleged errors are unpreserved and Young requests review under RCr 10.26.

During closing argument, the prosecutor stated:

> In voir dire, we talked about why it's not fair for people to just skip out on trial dates. Ms. Parker, you told us that it affects the system. Somebody else told us that it's important to appear for trial. Someone else said that it will waste the jury's time, and it did, it's also a waste of judicial resources.

"In speaking to the jury counsel should not indulge the familiarity of addressing any of the jurors by name." *Dept. of Highways v. Teater*, 397 S.W.2d 137, 140 (Ky. 1965). However, given the lack of objection and the overwhelming evidence against Young, we are not persuaded that manifest injustice occurred in this case.

The prosecutor also stated:

> Joseph Young tells us that he couldn't come because he didn't have a ride to court. Let me assure you members of the jury, people have walked to court to get to their trial dates or hearings. Joseph Young did not because Joseph Young had no intention of being found. Joseph Young did not call the court and ask that a bailiff be sent

> out to pick him up, people have done that, Joseph Young did not.

Young argues that this statement referred to facts not in evidence. Upon review of the record as a whole, we are not convinced that the statements are so flagrantly prejudicial as to render the trial fundamentally unfair.

Finally, Young argues that the Commonwealth made an improper "send a message" argument during the sentencing phase when it stated "[w]e will not be doing him any favors, or the community any favors, allowing him to remain out on the minimum sentence." This argument was properly preserved for appellate review.

"Send a message" arguments are those which "tend to cajole or coerce a jury to reach a verdict that would meet the public favor" or suggests "that a jury convict on grounds not reasonably inferred from the evidence." *Peyton v. Commonwealth*, 253 S.W.3d 504, 518 (Ky. 2008). Prosecutors are permitted wide latitude during closing argument to convince the jurors that the matter before them should not be dealt with lightly. *Id.* Here, the reference to the community was not in the same context as "send a message" arguments. Moreover, the jury did not return the maximum sentence. There was no palpable error.

As we have found no error, palpable or otherwise, Young is not entitled to reversal on the basis of cumulative errors.

Accordingly, the judgment of the Hardin Circuit Court is affirmed.

CAPERTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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