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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000045-MR

DOUGLAS PATTERSON — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, SPECIAL JUDGE
ACTION NO. 10-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KELLER AND NICKELL, JUDGES.

NICKELL, JUDGE: Douglas Patterson appeals from a judgment entered by the Bullitt Circuit Court on December 14, 2010, after a jury found him guilty of retaliating against a participant in a legal process.[1] Patterson waived jury

[1] Kentucky Revised Statutes (KRS) 524.055, a Class D felony.

sentencing and the trial court imposed a term of three years. Having reviewed the briefs, the law and the record we affirm.

In 2009, Patterson was involved in post-divorce litigation[2] in Bullitt County concerning his daughter's custody and visitation. Bullitt Circuit Judge Elise' Givhan Spainhour presided over the case and on October 23, 2009, signed an order prohibiting Patterson from having contact with his daughter after finding he had seriously endangered the child. Until entry of this order, Patterson thought highly of Judge Spainhour. His opinion changed, however, when his visitation was curtailed. While Joe Lucas, Patterson's stepfather, never heard Patterson say he would harm Judge Spainhour, he did hear Patterson call her a derogatory term and remark, "if anybody came between him and his child or tried to take his child away from him, that he would kill 'em."

Patterson went to Florida after the no contact order was entered. On October 28, 2009, Orange County, Florida Deputy Marc Attar, was dispatched to an Orlando convenience store where he met Patterson and heard him say, "the state of Kentucky took his daughter and he wanted to kill all the cops there and the judges."[3] Patterson was not charged or jailed in Florida as a result of his threats to kill the police and the judge, but instead was taken to Lakeside Behavioral Healthcare for assessment. Tonia Craig, a Lakeside employee, wrote in

[2] The record of the post-divorce litigation is not part of the record in this appeal.

[3] This was the testimony Deputy Attar gave at trial. In the report he filed to initiate Patterson's involuntary examination in Florida he wrote, "Subject advised me his daughter was taken by the FBI and state of Kentucky. Subject said he does not want to hurt himself, however he wants to kill the judge and cops, who took his daughter."

Patterson's paperwork that he could not be assessed because he was "verbally aggressive" and "explosive in his outbursts." He was released from Lakeside after a period of observation and made his way back to Kentucky a few days later.

Lakeside made a hotline referral about Patterson to Kentucky's Cabinet for Health and Family Services (CHFS). The matter was assigned to Nickie Hall, a CHFS investigator in Nelson County, Kentucky.[4] While trying to locate Patterson, Hall learned from his mother on November 5, 2009, that Patterson's visitation with his daughter had been suspended. Hall then spoke with Patterson on November 9, 2009, in Nelson County. During their conversation, Patterson became visibly upset and said "he would kill anyone that got in the way of him seeing his daughter, whether it be the police or the judge." Patterson went on to say he was not a violent person; his words were a promise, not a threat; and ultimately, he would have custody of his daughter. Hall completed her report on November 20, 2009, but did not share the information she had collected with anyone. Hall did not know which judge was handling Patterson's custody case.

By the first week of December 2009, Hall had learned of other threats Patterson had made and realized the situation was more serious than originally thought. At that point, Hall reported Patterson's comments to her supervisor in Nelson County who then contacted her counterpart in Bullitt County.

On December 8, 2009, Patterson went to the courthouse in Bullitt County to file a motion in the custody case. While there, he was interviewed by

[4] The case was referred to CHFS in Nelson County because that is where Patterson lives.

Bullitt County Deputy Mike Cook about his prior conversation with Hall. Multiple times, Patterson denied threatening a judge, but said his comments could have been misconstrued, although he could not identify who would have misconstrued them. Deputy Cook signed an affidavit stating that during the interview Patterson did not "appear to be psychotic or pose a danger or threat to himself or others. During our discussion Mr. Patterson remained calm, appeared oriented and was compliant with our questions."

That same day, however, Patterson was arrested and charged in Bullitt District Court with one count of retaliating against a participant in a legal process. Soon thereafter, Judge Spainhour was told by her secretary that police had learned of Patterson's threat to kill her. The police also advised Judge Spainhour directly of Patterson's threat. Upon learning of the threat, Judge Spainhour immediately recused from the custody case.

On December 15, 2009, the defense moved for Patterson to undergo a competency evaluation. A plea form signed by the Bullitt County Attorney's Office (but not the defense) on December 22, 2009, recites:

> DEFER 2 yrs upon condition △remains In Custody Competency & Meds Evaluation and advised follow up. No contact Judge Spainhour/Family/Property unless legitimate Court proceeding. Review 01/12/10 @ 1:30 p.m.

Then, on January 22, 2010, an order was entered by Bullitt District Court Judge Jennifer Porter setting aside:

> the original diversion agreement based on the Defendants (sic) inability to comply with the terms of the agreement. Defendant's counsel was to provide proof that Defendant had been evaluated and any recommendations were to be followed up with. There was nothing in the Court record that indicated this had been done. At the review date, the Defendant's counsel and the Commonwealth could not agree whether the Defendant should be evaluated as an inpatient or outpatient. Based on those facts, the Court set a Probable Cause Hearing.

On February 18, 2010, Patterson was indicted by the grand jury of Bullitt County on two counts of retaliating against a participant in a legal process based on the statement he had made to Hall in Nelson County—one count for unnamed police officers and the other count for Judge Spainhour. Patterson was arraigned five days later in Bullitt Circuit Court with Judge F. Kenneth Conliffe serving as special judge. On March 31, 2010, the defense filed a written motion for Patterson to be evaluated for competency and criminal responsibility at the Kentucky Correctional Psychiatric Center (KCPC). Based upon an evaluation conducted by Dr. Stephen Free, a psychologist at KCPC, the trial court found Patterson competent to stand trial.

A jury trial was held October 3 and 4, 2010. The count involving police officers was dismissed on Patterson's motion for a directed verdict at the close of the Commonwealth's case. The count involving Judge Spainhour resulted in conviction. This appeal followed.

On appeal, Patterson argues the proper venue for the case was Nelson County, not Bullitt County; a change of venue motion should have been granted;

the jury instruction regarding venue was flawed; a directed verdict should have been granted on the count involving Judge Spainhour because there was no proof of a direct threat; a Florida deputy sheriff was permitted to give unduly prejudicial testimony pursuant to KRE[5] 404(b); Judge Spainhour should not have been permitted to give victim impact testimony during the guilt phase of trial; three jurors who sat on the case should have been excused for cause; and a diversion agreement reached in district court should have been enforced. The Commonwealth argues venue was proper in Bullitt County because Patterson's words affected court proceedings in Bullitt County, and other alleged errors were either not preserved by objection at trial or were not errors at all. We address each issue in turn.

We begin with multiple claims related to the issue of venue, a term defined by Black's Law Dictionary (Seventh Ed. 1999) as "[t]he proper or a possible place for the trial of a lawsuit, usu. because the place has some connection with the events that have given rise to the lawsuit." Patterson argues first that venue in Bullitt County was improper because while he allegedly made threats in Florida and Nelson County, no threat was alleged to have been uttered in Bullitt County. Patterson bases his argument on KRS 452.510 which reads, "[u]nless otherwise provided by law, the venue of criminal prosecutions and penal actions is in the county or city in which the offense was committed." We deem it more appropriate to apply KRS 452.550, as did the trial court, which reads, "[w]here an

[5] Kentucky Rules of Evidence.

offense is committed partly in one and partly in another county, **or if acts and their effects** constituting an offense **occur in different counties**, the prosecution may be in either county in which any of such acts occurs." (Emphasis added). We apply this statute because when two statutory provisions conflict, "the specific provision takes precedence over the general provision." *Porter v. Commonwealth*, 841 S.W.2d 166, 168 (Ky. 1992) (citing *Morgan County Board of Education v. Elliott*, 260 Ky. 672, 86 S.W.2d 670 (1935)). While Patterson was indicted as a result of the threat he made to Hall in Nelson County, its intended and realized effect was on the judicial process in Bullitt County where Judge Spainhour recused from the custody case. Therefore, venue was proper in either Nelson County or Bullitt County. *See Commonwealth v. Self,* 802 S.W.2d 940, 942 (Ky. App. 1990).

Patterson next argues the jury instruction regarding venue was flawed because it did not require the Commonwealth to prove venue beyond a reasonable doubt. The Commonwealth argues the complaint is unpreserved for our review and we agree. The instruction given read:

> You will find the Defendant guilty of Retaliating Against a Participant in the Legal Process under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That on or about the 10th day of November, 2009, and before the finding of the Indictment herein, he made a statement to Nelson County Child Protective Services Investigator Martha "Nickie" Hall in which he made a threat to kill any Judge who came between him and his child,
>
> AND

B. That his intent in doing so was to retaliate against Judge Elise' Givhan Spainhour for rulings made by her against the interest of the Defendant in a Bullitt County, Kentucky Family Court Case;

AND

C. That the Defendant's acts related to Judge Elise' Givhan Spainhour acting as the Judge in that Family Court Case.

The wording resulted from the Commonwealth's request for a change to its tendered instruction. When the Commonwealth requested the phrase "in this County" be stricken from paragraph A and the phrase "in a Bullitt County, Kentucky Family Court Case" be added to paragraph B, Patterson objected referencing his original motion to dismiss for lack of venue and repeating his belief that Bullitt County "isn't the appropriate place for this case because the harm occurred here." In granting the Commonwealth's requested change, the court noted that Patterson was reiterating a point he had previously argued and the court had already denied. The point now argued on appeal, that the instruction did not require the Commonwealth to prove venue beyond a reasonable doubt, was not argued to the trial court and therefore will not be addressed in this Opinion. As has been said before, an appellant may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (overruled on other grounds by *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)). Furthermore, having failed to object on this basis, and the trial court having been given no opportunity to rule on this precise issue, it is

not properly preserved for our review. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky. 1998) (citing *Harrison v. Commonwealth*, 858 S.W.2d 172 (Ky. 1993)).

Patterson's third allegation of error is that he should have been granted a directed verdict because there was no proof of a "direct threat" against Judge Spainhour. He describes his statement to Hall as "a reactionary statement uttered in the heat of the moment upon learning upsetting news." The Commonwealth responds that a threat need not be "directly communicated to the victim to constitute an offense under KRS 524.055." We agree with the Commonwealth.

> When considering a motion for a directed verdict,
>
> > a trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
> >
> > On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187–88 (Ky. 1991) (internal quotation marks and citation omitted). A person retaliates against a participant in the legal process by engaging in or threatening to "engage in conduct causing or

intended to cause bodily injury or damage to the tangible property of a participant in the legal process or a person he or she believes may be called as a participant in the legal process in any official proceeding or because the person has participated in a legal proceeding" such as by deciding a case or performing one's duty. KRS 524.055. The word "threat" is defined in KRS 524.010(8) as:

> any direct threat to kill or injure a person protected by this chapter or an immediate family member of such a person. Persons protected by this chapter include persons who have been elected or appointed but have not yet taken office.

Based upon a literal reading of the definition, Patterson argues he could not be found guilty because he did not personally communicate a threat to Judge Spainhour. According to the uncontradicted evidence, on November 9, 2009, Patterson made a comment to Hall who reported it to her supervisor in Nelson County, who mentioned it to her counterpart in Bullitt County, who reported it to law enforcement, who reported it to Judge Spainhour's secretary, who finally shared the information with Judge Spainhour. Police told Judge Spainhour of Patterson's threat around the same time she learned of it from her secretary. Word of Patterson's threat reached Judge Spainhour about a month after it was made.

Our research has revealed no case defining conduct that qualifies as a "direct threat" and Patterson has cited none. The closest authority we have is *Rankin v. Commonwealth,* 265 S.W.3d 227 (Ky. App. 2007), on which the trial court relied in denying Patterson's motion for a directed verdict. In *Rankin,* a threat against a witness was communicated via telephone to the witness's

grandmother when she would not allow Rankin to speak to her grandson. Rankin alleged on appeal that the threat was insufficient because it was not communicated directly to the witness but rather was made to his grandmother, a *nonparticipant* in the legal process. Rankin was convicted of intimidating a participant in the legal process, KRS 524.040, for which the same definition of "threat" applies. Thus, contrary to Patterson's argument, and on the strength of *Rankin,* we conclude the maker of a threat need not communicate a threat personally to the victim without interruption to qualify as a "direct threat" under KRS 524.010(8).

Furthermore, Patterson's repetition of the threat to the Florida deputy, to Lakeside staff, and to his stepfather, indicates the statement to Hall was not a hasty one-time remark made without thought—but instead was a persistent, focused thought made to someone who would and did act upon it. Moreover, by the time the statement was made to Hall, Patterson had refined it to say "he would kill anyone that got in the way of him seeing his daughter, whether it be the police or the judge." Judge Spainhour was the only judge standing between him and his daughter, so obviously she was the object of his threat. In light of the foregoing evidence, it was not unreasonable for jurors to find Patterson guilty. *Benham.* Thus, the denial of the directed verdict motion was appropriate.

Patterson's fourth allegation of error is that Deputy Attar's testimony about the similar threat he made to him in Florida denied him due process and rendered his trial fundamentally unfair because it was unduly prejudicial. Because a person is to be tried only for the crime charged, and not on the basis of his

character, *O'Bryan v. Commonwealth,* 634 S.W.2d 153, 156 (Ky. 1982), evidence of other crimes, wrongs and acts is admissible only to establish some other purpose such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1). Such proof is also admissible when it is "so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(2).

Patterson maintains this issue was preserved in two ways—(1) a written objection filed before trial claiming the only purpose of testimony about other threats was to show his bad character and that the potential for prejudice outweighed any probative value, and (2) an objection voiced at trial that Deputy Attar's testimony would be cumulative of Hall's testimony. In contrast, the Commonwealth argues the complaint is unpreserved because the trial court said it would deny a general pre-trial objection but would rule on specific testimony, subject to renewed objections, at trial. Patterson never renewed his KRE 404(b) objection to Deputy Attar's testimony at trial—he objected to his testimony only as being cumulative of Hall's testimony. However, Hall did not mention Deputy Attar or the threat Patterson had made to him in Florida so the court properly overruled that objection because Hall had not provided specifics of the Florida statement and therefore, Deputy Attar's anticipated testimony was not cumulative of prior testimony. KRE 103(a)(1) requires the making of "a timely objection . . . stating the specific ground of objection. . ." to preserve an evidentiary ruling for

appeal. No such objection having been made, appellate review is improper. Moreover, were we inclined to review the claim, we would find no error as the threat expressed in Florida was communicated just thirteen days prior to the threat made to Hall in Kentucky, and was nearly verbatim to the statement made to Hall, thereby tending to prove the absence of mistake as permitted by KRE 404(b)(1).

Patterson's fifth contention is that Judge Spainhour was erroneously allowed to give victim impact testimony during the guilt phase of trial. This issue is unpreserved for our review. As the victim of Patterson's threat, the Commonwealth chose to present live testimony from Judge Spainhour despite the defense offer to stipulate that she was presiding over Patterson's custody case when she learned of the threat and recused. At a bench conference just before Judge Spainhour was called to the witness stand, the trial court ruled that she could testify about the case and how it was disrupted. There was no objection to this ruling and no objection to any of Judge Spainhour's testimony about how she had changed her personal and professional routines since learning of Patterson's threat on her life. It was not until Judge Spainhour began explaining how a recusal "jams up the system" and the philosophy of family court that allows one judge to handle all questions pertaining to a particular child, that Patterson objected to the *relevance* of her testimony. At that point, the trial court sustained the defense objection, noting that the witness had described the actions she had taken and that more testimony would be repetitive. There was no request for an admonition. The

trial court gave Patterson the only relief he requested. *Bell v. Commonwealth,* 473 S.W.2d 820, 821 (Ky. 1971). Therefore, no error occurred.

Patterson's sixth allegation of error is that a fair jury could not be seated in Bullitt County. A week before the scheduled trial date, Patterson moved the court to change venue to a county in which he could receive a fair trial, claiming the case had received media coverage, been a topic of gossip, and Judge Spainhour was an elected official from a prominent Bullitt County family. Accompanying the motion was a short news story that had appeared in The Pioneer News, an item that had been posted on a television station's website, and affidavits signed by three people with the same last name. The motion was heard the morning of trial. The Commonwealth argued that there had been no showing of bias. The trial court stated its dismay that few people read the newspaper these days, although some do watch television. Special Judge Conliffe, who lives in a neighboring county, stated that he had not heard a "general murmur" in Bullitt County and was inclined to go forward with jury selection but that if *voir dire* revealed a trend indicating it would be hard to seat a fair jury he would give "strong credence" to the defense motion to change venue. *Voir dire*, "the best test [of] whether local prejudices exist[,]" *Whitler v. Commonwealth,* 810 S.W.2d 505, 507 (Ky. 1991), revealed very few jurors were familiar with the case or its participants. No one was excused for having knowledge of the matter; two jurors, Juror #594, a former legal secretary of Judge Spainhour's father and Juror #634, a litigant in a divorce case over which Judge Spainhour had presided, were excused

for cause. Based upon the record as a whole, we cannot locate any error in the trial court's denial of the requested change in venue.

Patterson's seventh contention is that three jurors he struck via peremptory challenge, should have been struck for cause because of their interactions with Judge Spainhour. Had the court struck those jurors for cause, Patterson argues he could have used those peremptory challenges to remove three additional jurors which he had identified. Patterson argues Juror #617 should have been excused for cause because Judge Spainhour's former law firm, Givhan & Spainhour, had prepared his will about thirty years ago; Juror #487 should have been excused for cause because Judge Spainhour had presided over her son/grandson's recent custody case in which the potential juror had no activity; and Juror #401 should have been excused for cause because Givhan & Spainhour had represented his wife in a divorce from a prior spouse even though the potential juror had no involvement in the case. Both Juror #617 and Juror #401 said their knowledge of the Givhan & Spainhour law firm would not affect their impartiality. Juror #487 said her limited knowledge of her son/grandson's custody case would not pose a problem for her to sit on Patterson's case. All three motions were denied as being too remote.

"When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." RCr[6] 9.36(1). We review a trial court's denial of a

[6] Kentucky Rules of Criminal Procedure.

motion to strike for cause for an abuse of discretion. *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997) (overruled on other grounds *McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011)). Upon review of the record, we discern no "reasonable ground to believe" any of these three jurors was unqualified to render "a fair and impartial verdict." Thus, we see no abuse of discretion.

Patterson's final argument is that a diversion agreement reached in district court should have been enforced by the circuit court. Patterson is not entitled to relief on this claim for various reasons.

RCr 3.10 provides that a criminal defendant being held in custody is entitled to a preliminary hearing within ten days of his initial court appearance. Patterson did not receive a timely preliminary hearing because he had reached an agreement with the Commonwealth under which he would remain in custody for two years and undergo a competency and medical evaluation. For a reason not explained in the record, he did not receive that evaluation and the district court "set aside the original diversion agreement based on [Patterson's] inability to comply with the terms of the agreement." If Patterson disagreed with the district court's decision, the point should have been argued to the district court immediately and if the desired relief was not forthcoming, the issue should have been appealed to the circuit court. We are aware of no authority the circuit court would have had at the juncture this point was finally raised to direct the district court to enforce an agreement that had been set aside. Allowing ten months (January 20, 2010 – November 4, 2010) to pass, and then saying nothing to the circuit court until the

Commonwealth had closed its proof and rested its case, was neither timely nor the appropriate way to handle this issue.

Furthermore, we are at a loss to understand what type of relief Patterson expects. He says in his brief:

> [h]e accepted an offer for two years of diversion on December 15, 2009. Relying on that agreement, he remained in custody. His diversion was revoked on January 20, 2010.

The appellate record does not contain a document titled "Diversion Agreement." All we have is a plea form signed by an Assistant Bullitt County Attorney saying, "DEFER 2 yrs upon condition △remains In Custody. . . ." Without any contradictory explanation in the record, we must interpret this language to mean Patterson was willing to remain in custody for two years. The remedy for noncompliance with RCr 3.10 is release from custody "and he or she shall thereafter be proceeded against on that charge by indictment only." Patterson was indicted on February 18, 2010. Thus, any noncompliance with RCr 3.10 was remedied and the time he spent in custody would have been credited against his ultimate sentence of three years.

Despite Patterson's late mention of the diversion agreement, the trial court held a hearing[7] to determine whether the Commonwealth had reneged on its bargain. There being no proof presented from which the circuit court could fault

[7] *Workman v. Commonwealth,* 580 S.W.2d 206 (Ky. 1979).

the Commonwealth or find detrimental reliance by Patterson, the circuit court properly denied relief.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is AFFIRMED.

ALL CONCUR.

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