RENDERED: SEPTEMBER 21, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000717-MR

BASS WEBB — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 10-CR-00931

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Following a jury trial, Bass Webb was found guilty of third-degree assault and of being a first-degree persistent felony offender, and

[1] Senior Judge Joseph E. Lambert 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.

sentenced to fifteen-years' imprisonment. The convictions stemmed from an incident in which Webb threw a telephone at a detention center officer during a disturbance. On appeal, Webb argues that reversal is merited because the jury was not instructed on the statutory meaning of the word "attempt" and because he was entitled to a directed verdict on grounds of impossibility or a jury instruction on that defense. After careful review, we affirm.

On June 6, 2010, Webb was an inmate in the Fayette County Detention Center ("FCDC"). During a disturbance at the facility that involved multiple inmates and appropriately characterized as a "mini-riot," Webb threw a "pay-phone" style inmate telephone at a FCDC officer's head. The Fayette County grand jury subsequently indicted Webb on a charge of third-degree assault for attempting to cause physical injury to a detention center employee with a dangerous instrument or deadly weapon, a Class D felony. Webb was also indicted on a charge of being a first-degree persistent felony offender, a Class B felony.

Testimony and video evidence presented at trial reflected that at the time of the alleged assault, the FCDC Correctional Emergency Response Team ("CERT") was assigned to quell a disturbance in cellblock H of the detention center. Webb and other inmates were in a common area of the cellblock and refused to return to their cells. The inmates had removed shower doors and used them to barricade the entrance to the common room, and a number of them had wrapped towels around their heads in an effort to thwart any use of pepper spray by officers. An inmate telephone had also been torn off the wall, and evidence

reflected that Webb was holding the phone by its receiver and swinging it in a circle over his head in a threatening manner. Webb was also "hooting and hollering" at FCDC officers and challenging them to "come get some."

The CERT team entered the common room in a single-file formation. Officer Bryan Richardson, armed with an electronic incapacitation shield, was in the "#1 position" at the head of the line. Once the team was inside, the officers spread out across the room in a "line" formation, with Officer Richardson occupying the central position. The inmates were ordered to lie down, but they refused to comply. After Officers shot Webb in the thigh and neck with a pepper-ball launcher and a beanbag shotgun, Webb threw the inmate telephone at Officer Richardson's head. Officer Richardson had to raise his shield in order to deflect the phone away. As a result of the impact, the shield had a large crack, and its shock capability was damaged beyond repair.

The jury found Webb guilty of third-degree assault after concluding that he had intentionally attempted to cause physical injury to Officer Richardson. The jury also determined that Webb was a first-degree persistent felony offender. In accordance with the jury's recommendation, the trial court sentenced Webb to the maximum five-years' imprisonment on the assault conviction, enhanced to fifteen-years' imprisonment as a result of the PFO 1st conviction. This appeal followed.

Webb first argues that his convictions should be reversed, because the jury was not instructed on the statutory meaning of "attempt" when it was

considering whether to find Webb guilty of third-degree assault. Webb acknowledges that this issue was not presented below and is, therefore, unpreserved. As a general rule, this Court "is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky.App. 2009).

However, Webb asks us to consider the issue under the "palpable error" standard set forth in RCr 10.26. Under that rule, an unpreserved error may be considered on appeal only if the error is "palpable" and "affects the substantial rights of a party." RCr 10.26. As a general rule, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005) (internal citation omitted). Even when such an error is found, relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26; *see also Wiley v. Commonwealth*, 348 S.W.3d 570, 574 (Ky. 2010). In order to establish manifest injustice, a defendant must show "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Webb was charged and convicted of third-degree assault pursuant to KRS 508.025. KRS 508.025 provides, in pertinent part, that a person is guilty of third-degree assault when he "intentionally causes or attempts to cause physical injury to … [a]n employee of a detention facility[.]" KRS 508.025(1)(a)(2). The

Commonwealth's theory of liability was that Webb intentionally attempted to injure Officer Richardson by throwing an inmate telephone at him, and the jury instructions reflected this fact.

However, Webb argues that the jury instructions were deficient because the jury was not instructed on the statutory meaning of the word "attempt." Instead, the jury was merely told that a guilty verdict was appropriate if it found that Webb had "intentionally attempted to cause physical injury to Bryan Richardson by throwing a telephone at him[.]" Webb maintains that the jury additionally should have been instructed on the statutory meaning of "attempt" as that term is defined in KRS 506.010.

KRS 506.010 is the general "criminal attempt" statute. It defines the elements of criminal attempt and provides a down-grade in the class assigned to a crime that is attempted rather than completed, thus resulting in less severe possible punishments for attempts.

In contrast, KRS 508.025 directly addresses and incorporates the offense of attempted criminal assault under its provisions and provides the same penalty whether the offense is completed or merely attempted. *See* KRS 508.025(2). This harsher treatment of attempted assault has been attributed to the fact that "the legislature sought to protect law enforcement officers from violence while performing their public duty." *Commonwealth v. Johnson*, 245 S.W.3d 821, 824 (Ky.App. 2008); *see also Wyatt v. Commonwealth*, 738 S.W.2d 832, 834 (Ky. App. 1987), *abrogated on other grounds by McGuire v. Commonwealth*, 885

S.W.2d 931 (Ky. 1994). KRS 508.025 makes no effort to define the meaning of "attempt," and it does not incorporate KRS 506.010 nor reference its definition of attempt.

It does not appear that a Kentucky court has addressed the interplay between KRS 506.010 and KRS 508.025; *i.e.*, whether the inclusion of the word "attempt" in KRS 508.025 implicates KRS 506.010. In order for an error to be considered "palpable," it must be "easily perceived or obvious." *Nichols v. Commonwealth*, 142 S.W.3d 683, 691 (Ky. 2004); *see also Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Moreover, "[a]n error is 'palpable,' only if it is clear or plain under current law." *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009). Consequently, given that there is no precedent on the issue of whether a charge of attempted third-degree assault under KRS 508.025 requires the jury to be instructed on the elements of "attempt" as set forth in KRS 506.010, we cannot say that any error in failing to give such an instruction was palpable since the issue obviously is not "clear or plain under current law." *Id.* Therefore, Webb's claim that reversal is merited on these grounds must be rejected.

Webb's second and final argument is that he was entitled to a directed verdict on the assault charge due to "factual and legal impossibility" or, in the alternative, a jury instruction on impossibility as a defense to the charge. Webb essentially contends that because Officer Richardson was wearing protective gear and had a large shield in front of his body, it was impossible for the telephone to

hit him and cause physical injury. Consequently, Webb argues that he could not have been found guilty of third-degree assault – even under an attempt theory of liability – and was entitled to a directed verdict. Since this issue involves the applicability of a legal doctrine, our review is *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005).

From our research, it does not appear that "impossibility" of either the "factual" or "legal" variety has ever been considered by Kentucky courts to be a defense to a charge of attempt, and Webb has directed us to no mandatory authority standing for that proposition. However, multiple jurisdictions have addressed the issue extensively, and their decisions are instructive.

The doctrine of "impossibility" as it has been discussed in the context of inchoate crimes such as attempt "represents the conceptual dilemma that arises when, because of the defendant's mistake of fact or law, his actions could not possibly have resulted in the commission of the substantive crime underlying an attempt charge." *People v. Thousand*, 631 N.W.2d 694, 697-698 (Mich. 2001). "Legal impossibility is said to occur where the intended acts, even if completed, would not amount to a crime." *United States v. Berrigan*, 482 F.2d 171, 188 (3rd Cir. 1973); *see also In re Doe ("S.D.")*, 855 A.2d 1100, 1106 (D.C. 2004). Thus, legal impossibility would apply to those circumstances where: "(1) the motive, desire and expectation is to perform an act in violation of the law; (2) there is intention to perform a physical act; (3) there is a performance of the intended physical act; and (4) the consequence resulting from the intended act does not

amount to a crime." *Berrigan*, 482 F.2d at 188. In contrast, "factual impossibility is said to occur when extraneous circumstances unknown to the actor or beyond his control prevent consummation of the intended crime." *Id.*

It is generally accepted that, "at common law, legal impossibility is a defense to a charge of attempt, but factual impossibility is not." *Thousand*, 631 N.W.2d at 698; *see also United States v. Oviedo*, 525 F.2d 881, 883 (5th Cir. 1976); *Bandy v. State*, 575 S.W.2d 278, 279-280 (Tenn. 1979). Factual impossibility has been universally rejected by other jurisdictions as a defense to an inchoate offense such as criminal attempt, "because a defendant's success in attaining his criminal objective is not necessary for an attempt conviction." *United States v. Bauer*, 626 F.3d 1004, 1007 (8th Cir. 2010); *see also, e.g.*, *United States v. Cote*, 504 F.3d 682, 687 (7th Cir. 2007); *United States v. Dixon*, 449 F.3d 194, 202 (1st Cir. 2006); *State v. Carlisle*, 8 P.3d 391, 396 (Ariz. Ct. App. 2000). Because of this, "[t]he notion that it would be 'impossible' for the defendant to have committed the *completed* offense is simply irrelevant to the analysis." *Thousand*, 631 N.W.2d at 702; *see also Dixon*, 449 F.3d at 202; *State v. Curtiss*, 65 P.3d 207, 210-211 (Idaho Ct. App. 2002). Instead, "[i]t is the *intent* to commit the crime, not the possibility of success, that determines whether the act or omission constitutes the crime of attempt." *State v. Pappas*, 446 So. 2d 523, 524 (La. Ct. App. 1984).

The General Assembly's promulgation of KRS 506.010, when considered along with the Kentucky Crime Commission/Legislative Research

Commission Commentary to KRS 506.010, leads us to conclude that Kentucky has rejected impossibility as a defense to a charge of criminal attempt for purposes of KRS 506.010.

KRS 506.010 is virtually identical to § 5.01 of the Model Penal Code, which was drafted with an intent "to eliminate the distinction [between legal and factual impossibility] and abrogate the entire impossibility defense." *Commonwealth v. Henley*, 459 A.2d 365, 367 (Pa. Super. Ct. 1983). In their commentary on that provision, the drafters of the Model Penal Code explicitly rejected the impossibility defense, noting that liability should be "focused upon the circumstances as the actor believes them to be rather than as they actually exist." Model Penal Code § 5.01, Explanatory Note. This intent is evidenced in the language of the Model Penal Code and KRS 506.010(1)(a) – specifically, "if the attendant circumstances were as he believes them to be" – which can only be viewed as "clearly abrogat[ing] both the legal and factual impossibility defenses. For no matter what the actual extrinsic circumstances are, if the defendant intends to commit a crime, he may be guilty of attempt even if the crime is impossible to complete or his actions do not constitute a crime." *Henley*, 459 A.2d at 368.

Although the Commentary to KRS 506.010 differs somewhat from that for Model Penal Code § 5.01, it further evidences the General Assembly's intent to reject impossibility as a defense to criminal attempt under KRS 506.010. That Commentary provides, in relevant part, as follows:

> Impossibility of Performance: subsection (1)(a) deals with what has been known as **"impossibility of performance"** as a defense to a charge of criminal attempt. The matter has received some attention in Kentucky. A typical case is *McDowell v. Commonwealth,* 207 Ky. 680, 269 S.W. 1019 (1925), which involved the offense of detaining a female with intent to have carnal knowledge, a crime that was in the nature of an attempt but not designated as such. The defendant in this case had introduced proof that he was physically incapable of intercourse. **In refusing to accept this as a defense**, the Court of Appeals ruled that the offense required "only that the detaining should be made with the intention of accomplishing it." The same decision was made in a later case in which the intended victim was incapable of having intercourse. *Poston v. Commonwealth*, 281 Ky 460, 136 S.W.2d 565 (1940). **Subsection (1)(a) codifies this principle and bases liability for criminal attempt upon what a defendant perceives the attendant circumstances to be.**

(Emphasis added). Under KRS 506.010, the fact that performance of the completed offense would be impossible is irrelevant to a charge of criminal attempt.

Likewise, KRS 508.025 is not a defense to attempted third-degree assault. Therefore, Webb was not entitled to a directed verdict on grounds of impossibility or a jury instruction relying upon impossibility as a defense.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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