RENDERED: OCTOBER 26, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001111-MR

MATTHEW CUNNINGHAM — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 10-CR-00127

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

LAMBERT, SENIOR JUDGE: Matthew A. Cunningham (Matthew)[2] appeals from his conviction for intimidating a witness in a legal proceeding. On appeal,

[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.

[2] First names shall be used in lieu of surnames, as some of the parties involved share the same last name.

Matthew challenges the admission of three "jail phone calls" into evidence and the sufficiency of the evidence overall. Upon a review of the record, we affirm the Mason Circuit Court.

History

In June of 2010, Tina Sullivan lived in Maysville, Kentucky, at the corner of Wood Street and Forest Avenue. When pulling her vehicle into a gas station near her home, she observed an assault in a parking lot on Forest. She saw men using brass knuckles and a knife, while hitting, kicking, and otherwise beating a man who was on the ground. Tina called 911 and gave a statement to police about the assault. She identified the two perpetrators as Gary Cunningham (the Appellant's brother) and Justin Idol (the Appellant's half-brother). She identified Gary as the man with the knife and Justin as the man with the brass knuckles. Based partly on Tina's statement, Justin and Gary were arrested and held in the Maysville jail. While he was there, Justin made six telephone calls. Some of these calls were alleged to have been made to Matthew.

Ken Fuller, a criminal investigator for the City of Maysville, monitors phone calls in the jail. At trial, Fuller testified and brought recordings of these six telephone calls for admission into evidence. Matthew objected to their admission on the grounds of relevance, hearsay, and violation of the Confrontation Clause. The court overruled the objection, and allowed excerpts of three of the telephone calls to be played at trial.[3]

[3] Matthew makes no argument with respect to Kentucky Rules of Evidence (KRE) 106, "the rule of completeness."

In the first admitted call, Justin was speaking to an unidentified person whom the Commonwealth alleged to be Matthew. During this call, a voice can be heard saying, "Do you want to talk to Mom?" Matthew's other brother, Gary, was in jail at this time. The recording mentions a witness named Kim Brooks.

In the second admitted call, Justin calls the same telephone number as the first call. In this conversation, Justin can be heard saying something about "going off on that bitch," and again mentions the witness Kim Brooks.

In the third admitted call, from Idol to an individual named William Laughton, a voice refers to Tina Sullivan.

Nine days after this series of phone calls was made, on July 19, 2010, Tina left her home to get a soda. Tina left her two-year-old daughter and her child's father, Ronnie, on her porch stoop. As she crossed the street and approached the soda machine, Tina was met by a man who claimed he knew she was "the bitch that wrote the statement" against his brothers. Tina described the man as having dreaded hair that was pulled back and as wearing jean shorts. The man said that he'd seen a picture of her and her statement and that he knew she was the "bitch" that did it. The man then threatened her life and that of her two-year-old daughter.

Tracy Stone, a woman who was delivering items to a church near the corner of Wood and Forest, testified that she heard a man "hollering" at Tina, and saying "you the bitch who told on my brothers, my family." She further testified to hearing the man tell Tina that if she didn't recant her statement, he would "kill

[her] and [her] child." Tracy testified that she wasn't really friends with Tina, but that she was concerned for her, so she stopped by Tina's apartment to check on her.

After the incident, Tina called the police. Tina told police that she had been threatened by a "Cunningham individual" about the case where she had given a statement. About half an hour later, there was a warehouse fire very close to Tina's house. Tina and Tracy (who was with Tina by this point) went outside to smoke a cigarette. Tina testified to seeing the man who had threatened her and another man running from the direction of the warehouse fire. Tracy testified that it was not two men, but two teenage girls they saw running.

Major Lisa O'Hearn arrived at the scene in her police vehicle to respond to a call about the fire. Tina saw Major O'Hearn and handed her a written statement about the man who had threatened her through the cruiser window. Tina was scared for her life and the life of her daughter. Major O'Hearn arranged for Sullivan to stay at a crisis center that night.

Two days later, Tina was given a photo lineup of six individuals, three of whom were Cunningham brothers. Tina had never met the Appellant before the night he threatened her, but she was aware he was a Cunningham because of the context of the conversation. When Tina viewed the first lineup (of which Matthew was not a part), she did not identify any of the individuals as the perpetrator. Major O'Hearn then gave Tina a second lineup which did contain Matthew's photograph. Tina identified the Appellant and wrote on the lineup: "This is the one

who threatened me." Tina later identified Matthew at trial. Tracy also identified Matthew at trial.

At trial, Carmen Jones testified on Matthew's behalf. Carmen testified that Matthew was at her home the whole evening, from five o'clock until eleven o'clock. She testified that the only time Matthew went outside was to take one of her children to the end of the driveway to look at the warehouse fire. Carmen lived about three blocks from the fire. Major O'Hearn testified at trial that she recalled seeing Matthew on the street corner near Tina's house when she responded to the warehouse fire.

The jury returned a verdict of guilty for intimidating a witness in a legal proceeding and Matthew was sentenced to two-and-one-half years' imprisonment.

Matthew now appeals to this Court. On appeal, he argues that the trial court violated his Sixth Amendment right to confront the witnesses against him by admitting the tape excerpts, that the tapes contained inadmissible hearsay, that the tapes should not have been admitted on relevancy grounds, and that there was insufficient evidence to support the conviction.

Standard of Review

Determinations regarding the admissibility of evidence are within the sound discretion of the trial court. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). A trial court abuses that discretion when it makes a determination

which is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Analysis

We first address Matthew's argument that his Confrontation Clause rights were violated when the excerpts from the tapes were played. Two of the tapes were purported to have been conversations between Justin and Matthew, and the third was purported to have been a conversation between Justin and William. Neither Justin nor William was present at trial.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that only out-of-court statements which are "testimonial" in nature violate the Confrontation Clause. Statements are testimonial where they are "made under circumstances which would lead an objective witness to reasonably believe that the statement[s] would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Our Supreme Court has noted that examples of testimonial statements include "testimony at a preliminary hearing, before a grand jury, or at a former trial; and statements made in response to police interrogations." *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 243 (Ky. 2009).

The tape excerpts at issue in this case were portions of private telephone calls Justin made to Wallace and Matthew. An objective witness would not reasonably believe that Justin's personal telephone conversations from jail with his brother and friend would be the sort which would be later used at trial. They

are not testimonial in nature. *See, e.g., United States v. Franklin*, 415 F.3d 537, 546 (6thCir. 2005).

While the Sixth Amendment prohibits the admission of testimonial hearsay, "[t]he admissibility of non-testimonial hearsay is governed by a state's rules of evidence." *Roach v. Commonwealth*, 313 S.W.3d 101, 111-112 (Ky. 2010). Because the excerpts in the present case were non-testimonial, their admission is governed solely by the Kentucky Rules of Evidence. *Id* at 112.

Thus, we now turn to a discussion of whether the tapes were admissible under the rules of evidence. Their admissibility is dependent upon whether or not the statements fall within firmly rooted exceptions to the hearsay rule, or whether there was some showing of particularized guarantees of trustworthiness. *Franklin*, 415 F.3d at 546.

The first tape contained the following:

Voice 1: [unintelligible]

Voice 2: Kim.

Voice 1: She showed up down there?

Voice 2: Huh?

Voice 1: She showed up down there?

Voice 2: Do what?

Voice 1: She showed up down there?

Voice2: Naw, they had her name on the list.

Voice 1: [unintelligible]

Voice 2: They lowered my bond, though [unintelligible] getting out on that motherfucker.

Voice 1: When do you go to court next?

Voice 2: Shit, 28th of July

Voice 1: 28th of July?

The second tape, reflecting an excerpt of another conversation between Matthew and Justin, contained the following:

Voice 2: You know Kim. [unintelligible]

Voice 1: [unintelligible] she's a witness on this list

Voice 2: [unintelligible] need to go off on that bitch

The third tape, reflecting an excerpt of a conversation between William and Justin, contained the following:

Voice 1: Guess who's a witness against me, two witnesses?

Voice 2: Who?

Voice 1: That motherfucker who lives across the street from you.

Voice 2: Who?

Voice 1: That motherfucker who lives across the street from you.

Voice 2: Who?

Voice 1: From you, that girl and that dude. I forget their names. Hey, what's that name?

Voice 3: [in background] Tina Sullivan

Voice 1: Tina Sullivan

Voice 2: Who?

Voice 1: Tina Sullivan

Voice 2: Tina Sullivan?

Voice 1: Yeah, they live like [unintelligible] across from you.

Voice 2: On Buckman Street?

Voice 1: Ah, yeah, that where it is? Yeah, they witnesses against me, but that shit ain't going to hold up, they got three trials against me. I ain't even do it, they just don't like me, you feel it?

Voice 2: Ah, damn.

Voice 1. Yeah.

Under KRE 402, all relevant evidence is admissible. Evidence is relevant if it tends to make the existence of any fact of consequence more or less likely. KRE 401. The information in these tapes is relevant. At the very least, it shows that Justin, Matthew, and William were aware of the witness list and names that were on it. Further, the statement that someone "needs to go off on that bitch," in reference to a witness, is probative of whether Justin was attempting to solicit individuals to intimidate the witnesses.

Upon finding evidence to be relevant, we next ask whether its probative value is substantially outweighed by the danger of unfair prejudice. KRE 403. We find that it was not. Rather, the jury had already heard testimony from the victim and another individual that Matthew threatened her regarding her testimony against his brother. There is no unfair prejudice here.

Hence, we now turn to a discussion of whether the tapes, while otherwise admissible, should have been excluded under the hearsay rules. At trial,

defense counsel objected on hearsay grounds. The trial court overruled the objection and allowed the tapes into evidence.

Under the hearsay rule, out-of-court statements by a declarant cannot be admitted to prove the truth of the matter asserted at trial. KRE 801. Here, the Commonwealth stated that it was introducing the tapes to show the "defendant's brother was making calls; putting information out to anybody and everybody he could about who the witnesses were against him…in order to try and get something done." The Commonwealth further stated that it was "trying to show that the defendant's brother was putting the word on the street…"

As our Supreme Court has previously stated, "[i]f an out-of-court statement is admitted for a purpose other than to prove the truth of the matter asserted, the out-of-court statement does not constitute hearsay evidence. *Slaven v. Commonwealth*, 962 S.W.2d 845, 855 (Ky. 1997). The tapes clearly contained out-of-court statements; however the Commonwealth's purpose in introducing the tapes was not to show that Matthew intimidated Tina, but to show that Matthew's brother had knowledge of the witnesses against him and was "putting the word out on the street" that he wanted something done about them.

Because the statements were not introduced for the truth of the matter asserted, we find no error.

Finally, we reach the last assignment of error on review, that the trial court erred by failing to grant a directed verdict. The test for a directed verdict is whether, "under the evidence as a whole, it would be clearly unreasonable for a

jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). To meet this burden, the Commonwealth must come forward with more than "a mere scintilla of evidence." *Id*. at 188.

In the present case, two people testified that Matthew approached Tina and threatened to harm or kill her. Further, Tina identified Matthew in a photo lineup after the threat. Finally, both Tina and Tracy identified Matthew at trial. Clearly, this is more than a scintilla. As the finder of fact, the jury is free to weigh the evidence and determine which witnesses it believes to be credible. *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994).

In light of the foregoing, we affirm the Mason Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Susan Jackson Balliet
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky