

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001851-MR

LOVE BAREFIELD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NOS. 10-CR-003772 & 11-CR-001484

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Love Barefield appeals from multiple convictions after a jury trial, arguing that he is entitled to a new trial because the guilty verdicts were tainted by improper character evidence and he is entitled to the reversal of his conviction for intimidating a participant in the legal process on the basis of insufficient evidence.

Barefield and Yvonne Smith had a romantic relationship and previously lived together. According to Smith, on June 30, 2010, they began arguing about Barefield having an affair. Barefield left Smith's apartment. Shortly after midnight on July 1, 2010, Barefield returned and became angry when Smith would not let him back into her apartment. Barefield made attempts to get in and Smith finally let him inside.

According to Smith, Barefield repeatedly assaulted her causing injuries. While Barefield was in another room, Smith grabbed her cell phone, dialed 911 and received an answer. Barefield returned, took the phone and destroyed it. Later, Barefield forced Smith to have sex with him. When Barefield left, Smith ran to a payphone and called the police.

Barefield was indicted for rape in the first degree, assault in the second degree, two counts of intimidating a participant in the legal process, wanton endangerment in the first degree, and being a persistent felony offender in the first degree. The first count of intimidating a participant in the legal process was based upon Barefield's destruction of Smith's cell phone.

During a statement taped by detectives, Barefield admitted to calling Smith names, pulling off her hair extensions, destroying a DVD player and tearing up her cell phone, but denied cutting or stabbing Smith and having sex with her during the altercation. He stated they had consensual sex earlier in the week.

Following a jury trial, Barefield was acquitted of rape, convicted on the two counts of intimidating a participant in the legal process and convicted of

the lesser included offenses of assault in the fourth degree and wanton endangerment in the second degree. The jury recommended that Barefield be sentenced to four years for the first count of intimidating a participant in a legal process, five years for the second count of intimidating a participant in the legal process and determined that these terms should run consecutively. The jury also found Barefield guilty of being a persistent felony offender in the first degree and enhanced his nine-year sentence to thirteen years and six months. On September 7, 2011, Barefield was sentenced in accordance with these terms.

Barefield argues that during his trial, the circuit court erred by improperly admitting his statements that he committed other previous unrelated crimes. He argues that this prejudiced him because his convictions could be the result of the jury believing that he had a propensity for criminal behavior. We review the circuit court's denial of the motion to exclude Barefield's statements under the abuse of discretion standard, and will not disturb its ruling unless "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (footnote omitted).

On July 1, 2010, in a taped statement, Barefield was asked to submit to a voluntary DNA test and refused. During the course of his refusal, Barefield indicated that he had not been intimate with Smith that day and did not expect her medical exam would reveal his DNA. He indicated that he was skeptical of voluntarily giving his DNA, because it could implicate him in other crimes. Over

the course of several exchanges about whether he would voluntarily give his DNA,

he made the following statements:

I know a real . . . DNA now solvin' a lot of unsolved cases and stuff I got a lot of shit out there. I got a lot of shit out there . . . I got, I done a lot of shit on the streets, man. Uh . . . I'll be (inaudible) myself if I did that, not with her, but just in general. It's period. I ain't tryin' to make your all's job hard or anything, but

Barefield's DNA was later obtained pursuant to a court order. Audio of his statements were admitted at trial over his objections, played for the jury during the Commonwealth's case in chief and replayed for the jury at its request during deliberations. The Commonwealth has not provided any reason why these statements should be admissible other than the fact that they were given after Barefield was properly Mirandized.

Barefield's statements, which referenced prior uncharged criminal acts to which DNA testing might connect him, were inadmissible prior bad acts under KRE 404(b). Any prior crimes were unconnected to any crime for which Barefield was being prosecuted, his statements were not being used for any proper purpose under KRE 404(a) and, thus, must have been offered solely to impugn his character and show his propensity to commit crimes, making the statements inadmissible.

Chavies v. Commonwealth, 374 S.W.3d 313, 321 (Ky. 2012); *Anderson*, 231 S.W.3d at 120-121. Accordingly, the circuit court abused its discretion in admitting such statements in violation of KRE 404.

When erroneously admitted evidence has a reasonable possibility of contributing to a conviction, we must reverse. *Anderson*, 231 S.W.3d at 122. The statements were not harmless, because the evidence in this case was largely a matter of determining whether to believe Barefield or Smith and resulted in a mixed verdict. Although the jury acquitted Barefield of rape and the statements could not have prejudiced him on that count, his convictions on other counts could have been based on this improper character evidence. Because the jury asked to hear these statements again during deliberations, it appears that this evidence may have contributed to the jury's decision to convict Barefield of the other crimes. Accordingly, we reverse and remand for a new trial.

We consider Barefield's additional claim of error that his first conviction for intimidating a participant in a legal process under KRS 524.040 is legally insufficient, because the Commonwealth is likely to again pursue this charge in any subsequent trial. Barefield argues that at the time he destroyed Smith's cell phone he could not have believed that she was a participant in the legal process and the circuit court should have granted his motion for a directed verdict on this count. We interpret statutes *de novo* according to their plain meaning and attempt to interpret statutes consistently with legislative intent. *Commonwealth v. McBride*, 281 S.W.3d 799, 803 (Ky. 2009).

The portions of KRS 524.040 which are relevant to determining whether Barefield's actions are a crime are as follows:

(1) A person is guilty of intimidating a participant in the legal process when, by use of physical force or a threat directed to a person he believes to be a participant in the legal process, he or she:

.....

(f) Hinders, delays, or prevents the communication to a law enforcement officer or judge of information relating to the possible commission of an offense . . .

(2) For purposes of this section:

(a) An official proceeding need not be pending or about to be instituted at the time of the offense . . .

.....

(4) In order for a person to be convicted of a violation of this section, the act against a participant in the legal process . . . shall be related to the performance of a duty or role played by the participant in the legal process.

Under KRS 524.010(3) a “participant in the legal process” includes a witness and under KRS 524.010(9), a “witness” includes “any person who may be called to testify in an official proceeding.” KRS 524.010 does not separately define “legal process.”

In *Moreland v. Commonwealth*, 322 S.W.3d 66, 69 (Ky. 2010), the Kentucky Supreme Court discussed amendments to KRS 524.040 and determined that its altered language added the requirement that “the perpetrator believes the victim is participating in the legal process *at the time the offense is made.*” In *Moreland*, after the perpetrator raped his victims, he threatened them with harm if they reported his actions. Given these facts, the Court determined that “[i]t is

impossible to conclude that [the perpetrator] believed any of the three victims ‘to be a participant in the legal process’ at the time of the offenses since no legal process yet existed, nor could [the perpetrator] have believed that any legal process had been initiated.” *Id.* at 70.

The Commonwealth asserts Barefield could properly be convicted of intimidating a participant in the legal process because he prevented Smith from contacting the police about the possible commission of an offense under KRS 524.040(1)(f), and Smith qualified as a participant in the legal process as a potential witness. The Commonwealth attempts to distinguish *Moreland* because Smith was attempting to contact the police when Barefield destroyed her phone. It claims that Barefield could have believed that Smith’s phone call was an initiation of the legal process.

We do not agree that if the jury believed Barefield knew Smith was attempting to call the police, it follows he believed Smith was a participant in the legal process. While KRS 524.040(2)(a) states “[a]n official proceeding need not be pending or about to be instituted at the time of the offense,” this provision simply means that the defendant’s belief need not reflect factual accuracy. Although KRS 524.010 does not define “legal process,” it requires more action than just reporting a crime, seeking assistance from the police or attempting to initiate a police investigation. *See Godby v. Commonwealth*, 187 S.W.3d 857, 859 n.3 (Ky.App. 2005) (raising the issue but declining to decide whether a police

department's internal investigation process which had not yet resulted in any charges came within the definition of "legal process" under KRS 524.040).

The definition of "legal process" in other contexts provides support for Barefield's position that calling 911 as a matter of law is not an initiation of the legal process. In *Fulcher v. Commonwealth*, 149 S.W.3d 363, 377 (Ky. 2004), the Kentucky Supreme Court defined the term "legal process" for purposes of KRS 505.020(1)(c) as including the issuance of an arrest warrant, the grand jury's indictment and the arraignment.¹ "[D]efinitions within the Penal Code are certainly persuasive authority in defining such terms even outside of the criminal law." *Shepherd v. Suburban Motor Freight, Inc.*, 780 S.W.2d 633, 634 (Ky.App. 1989). The Supreme Court's definition of a term in one portion of the Penal Code should be equally persuasive authority in defining the same term in another portion of the Penal Code. Accordingly, we find the definition in *Fulcher* persuasive.

Additionally, other cases make it appear that "legal process" at minimum requires some significant step in a criminal action or civil suit, such as filings with a court which begin a case. See *Commonwealth ex rel. Morris v. Morris*, 984 S.W.2d 840, 841 (Ky. 1998) (discussing 42 U.S.C. § 659(e)'s definition of "legal process" as including "any writ, order, summons, or other similar process in the nature of garnishment"); *Sprint Communications Co., L.P. v. Leggett*, 307 S.W.3d 109, 113-119 (Ky. 2010) (discussing legal process in the context of the tort of

¹ KRS 505.020(1)(c) establishes that a course of criminal conduct, when interrupted by "legal process" makes a subsequent offense no longer part of one course of criminal conduct.

abuse of process and equating legal process with the initiation of a legal action such as through the filing of a lawsuit or obtaining an indictment).

Under the rule of lenity, we give the defendant the benefit of the doubt when it is unclear whether a particular act was intended to be punishable as a crime.

Roney v. Commonwealth, 695 S.W.2d 863, 864 (Ky. 1985). Therefore, we will not interpret “legal process” as beginning with a victim’s attempt to contact law enforcement. Barefield should have received a directed verdict on this count.

Accordingly, we reverse Barefield’s conviction by the Jefferson Circuit Court and remand for a new trial.

STUMBO, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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