

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002117-MR

CHARLES CRUMES

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 12-CR-00445

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: Charles Crumes appeals from the Campbell Circuit Court's judgment adjudicating him guilty of Assault in the Second Degree and sentencing him to seven years' imprisonment. For the following reasons, we affirm.

On April 22, 2012, Richard Mitchell asked Crumes to come to his house to sell his friend some drugs and Crumes obliged. The drugs later turned out to be

fake. The next morning, Mitchell went to Heather Watson's residence and, inside the home, spoke to Heather's brother, Albert Watson. Albert told Mitchell that he planned to buy drugs from Crumes, and Mitchell warned Albert that the drugs may be fake.

Crumes entered the room where Mitchell and Albert were talking, having overheard their conversation. After several verbal exchanges, Crumes attacked Mitchell, who responded by swinging at Crumes. Heather intervened, asking Mitchell to leave and stepping between Mitchell and Crumes.¹ As Heather pushed Mitchell towards the door, Crumes reached over Heather and stabbed Mitchell in the chest. After Mitchell left, Heather saw Crumes holding the knife.

Mitchell felt the wound outside Heather's house. He returned home, where his father insisted he go to the hospital. Later that night, Mitchell reported the stabbing to the police. Crumes was ultimately arrested several days later. After his arrest, Crumes made four phone calls in which he allegedly admitted to stabbing Mitchell, and those phone calls were recorded.

At trial, Crumes claimed his actions were in self-defense and requested a jury instruction on the Castle Doctrine, but the court refused. The jury found Crumes guilty of Assault in the Second Degree and recommended a sentence of seven years, which the trial court imposed. This appeal follows.

¹ Witnesses disagree on the exact order of events, but the order is irrelevant for purposes of this appeal.

Crumes raises five alleged errors: (1) the trial court admitted improper KRE² 404(b) prior bad acts evidence; (2) the trial court violated KRE 403 when it allowed Mitchell to show his scar to the jury; (3) the Commonwealth improperly defined reasonable doubt for the jury; (4) the trial court failed to instruct the jury on the Castle Doctrine; and (5) cumulative error.

First, Crumes claims that the trial court improperly allowed the jury to hear prejudicial evidence of a prior stabbing discussed in a recorded phone call made by Crumes from jail. Yet, at trial, the recordings were introduced as evidence of the instant stabbing, not as evidence of a prior stabbing. Crumes's only objection to the recordings was concern over the jury hearing that they were recorded in jail, essentially a KRE 403 objection for fear that such information would prejudice the jury against Crumes. Crumes was given a recess to review the tapes and strategize, and Crumes did not object to the content of the tapes or to the tapes being played. In order to avoid prejudice, the jury was not informed that the calls were recorded while Crumes was in jail. Crumes made no other objections to the recordings. In fact, Crumes stated that he had no problem with the substance of the conversations. He made no mention of the recorded conversations allegedly referring to another stabbing incident.

Crumes did not claim that the recorded conversations referred to a separate stabbing incident until he filed his appellate brief, in which he argues for the first time that admitting the recordings into evidence violated KRE 404(b), which

² Kentucky Rules of Evidence.

prohibits evidence of prior bad acts from being admitted for the purpose of proving bad character and conformity therewith. This alleged violation was never brought to the trial court's attention, so we must review it for palpable error.

In *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009), the Kentucky Supreme Court discussed the palpable error rule of RCr³ 10.26, and stated

an unpreserved error may be noticed on appeal only if the error is “palpable” and “affects the substantial rights of a party,” and even then relief is appropriate only “upon a determination that manifest injustice has resulted from the error.” An error is “palpable,” we have explained, only if it is clear or plain under current law, *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), and in general 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). *But see United States v. Olano*, 507 U.S. at 735, 113 S.Ct. 1770 (discussing the federal “plain error” standard and noting, without deciding, that there may be forfeited errors so fundamental that they “can be corrected regardless of their effect on the outcome.”). An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

283 S.W.3d at 668.

Under the clear holding of *Jones*, palpable error relief is not available unless three conditions are present. The error must have (1) been clear or plain

³ Kentucky Rules of Criminal Procedure.

under existing law, (2) been more likely than ordinary error to have affected the judgment, and (3) so seriously affected the fairness, integrity or public reputation of the proceeding to have been jurisprudentially intolerable.

Crumes stated at trial that he had no problem with the content of the recordings, and made no reference to a prior stabbing. The recordings themselves do not include any information making it obvious that the speakers are referring to a separate incident. Without any knowledge or notice of a potential reference to a prior stabbing, the trial court had no reason to exclude the recordings pursuant to KRE 404(b). If the recordings referred to a prior incident, Crumes should have notified the trial court. We do not believe a clear or plain error occurred regarding the recorded conversations, particularly not a palpable error yielding a manifest injustice.

Crumes also argues on appeal that discovery rules were violated because he was not provided with the recordings prior to his trial. However, Crumes made no such objection at trial. Absent sufficient preservation, this alleged error may only be considered on appeal if the error is palpable. RCr 10.26. We do not believe this constitutes palpable error. Crumes acknowledged that he had previously received the taped phone calls during the trial. Further, Crumes received a recess to review the calls and strategize before the calls were played for the jury. Accordingly, we find no evidence of palpable error with regard to production of the taped phone calls.

Next, Crumes maintains that the trial court violated KRE 403 when it permitted Mitchell to show his scar to the jury, since the scar itself was prejudicial and cumulative. KRE 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”

The standard of review [of an alleged KRE 403 violation] is whether there has been an abuse of that discretion. The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or supported by sound legal principles. “The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge.”

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

While displaying the scar may not have been necessary for the Commonwealth to prove physical injury, the scar was relevant in demonstrating to the jury the mechanics of what happened, especially given Crumes’s claims of self-defense. In addition, any prejudice Crumes suffered as a result of this evidence being presented to the jury did not substantially outweigh the probative value of the scar. In fact, the Supreme Court has ruled in multiple cases that exhibition of a scar or wound is permissible for showing the jury the positions of the actors, an important feature in a case where the defendant claims self-defense. *See Blackburn v. Commonwealth*, 349 S.W.2d 835, 836 (Ky. 1961); *Davidson v.*

Commonwealth, 261 Ky. 158, 162, 87 S.W.2d 119, 121 (1935). We do not find that the trial court abused its discretion in allowing the jury to see Mitchell's scar.

Crumes's third alleged error concerns the Commonwealth's opening argument, and whether the Commonwealth impermissibly defined reasonable doubt for the jurors. The Commonwealth told the jury:

The judge says you've got to prove, Commonwealth, that this is a three-way in front of us. So I sit there and I show you that there is spaghetti, and there's chili and there's cheese. And you're sitting there saying "I'm not satisfied. I want to know if there's those little oyster crackers on it. You know what I'm wondering, did she put hot sauce on it?" The Commonwealth only has to prove the elements that the judge gives you beyond a reasonable doubt.

Crumes cites *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984), for the rule that the Commonwealth may not define reasonable doubt in its opening statement. He claims that the Commonwealth violated this standard by giving the jury a misleading analogy as to one aspect of reasonable doubt, the Commonwealth's burden of proof. Crumes did not object to this alleged violation at trial, so we will again review this claim for palpable error.

Here, we do not believe any error has occurred, let alone a plain and obvious error rendering the trial unfair. We do not believe the Commonwealth attempted to define reasonable doubt. In its analogy, the Commonwealth simply explained to the jury that its burden is to prove the elements of the crime of assault, not any other extraneous facts. Moreover, we find it unlikely that the outcome of the trial

would have differed had the Commonwealth not been permitted to use this particular analogy.

Fourth, Crumes claims the trial court erred by refusing to instruct the jury on the Castle Doctrine.

Appellate review of jury instructions is a matter of law and, thus, *de novo*. “Instructions must be based upon the evidence and they must properly and intelligibly state the law.” An instruction's function is “only to state what the jury must believe from the evidence . . . in order to return a verdict in favor of the party who bears the burden of proof[.]”

Reece v. Dixie Warehouse & Cartage Co., 188 S.W.3d 440, 449 (Ky. App. 2006)

(citations omitted). “Although a trial judge has a duty to prepare and give instructions on the whole law of the case, . . . that duty does not require an instruction on a theory with no evidentiary foundation.” *Houston v.*

Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998) (citations omitted).

The Castle Doctrine, KRS⁴ 503.055(1), states:

A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

⁴ Kentucky Revised Statutes.

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

The trial court found that Crumes failed to prove that Mitchell had unlawfully and forcibly entered Heather's home, and thus refused to instruct the jury on the Castle Doctrine. Crumes claims because Heather asked Mitchell to leave multiple times, Mitchell was unlawfully in the home, and because he swung at Crumes, Crumes was defending himself when he stabbed Mitchell. We agree with the trial court's conclusion that no evidence supports Crumes's theory that Mitchell entered the dwelling "forcibly and unlawfully." Crumes did not see Mitchell enter the home, and Heather asking Mitchell to leave is insufficient to invoke the Castle Doctrine. We agree with the trial court that Crumes introduced insufficient evidence to support a jury instruction on the Castle Doctrine defense.

Lastly, Crumes argues that the cumulative effect of the prejudice from all of the alleged errors rendered the trial fundamentally unfair, and he is therefore entitled to reversal. Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. The Kentucky Supreme Court has found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (citation omitted). Here, Crumes's alleged errors are not errors at all, and certainly did not render the trial unfair. Hence, he is not entitled to reversal based on cumulative error.

The judgment and sentence of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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