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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000614-MR

WAYNE A. IRVIN — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 12-CR-00152

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, JONES AND STUMBO, JUDGES.

STUMBO, JUDGE: Wayne Irvin appeals from his conviction of first-degree criminal mischief, third-degree criminal attempt to commit arson, menacing, and violation of a domestic violence order (DVO). He argues that the trial court erred in not excluding certain evidence, in not giving the jury a missing evidence instruction, and in assessing $155 in court costs. We find no error and affirm.

Appellant and Melissa Bowling began a relationship in 2011. The couple lived together in Richmond, Kentucky, for a time. On November 2, 2011, Ms. Bowling obtained a DVO against Appellant which was not to expire until May 2, 2012. Appellant moved out of the house. In February of 2012, the couple resumed their relationship and Appellant eventually moved back in with Ms. Bowling in the Richmond residence.

On April 17, 2012, Ms. Bowling was at work in Frankfort. She spoke with Appellant on the phone and the two got into an argument. Ms. Bowling hung up on Appellant. Appellant then called Ms. Bowling throughout the day, but she never answered. Appellant left 17 voicemails.[1]

Around 5:30 p.m., before Ms. Bowling left work, she called the Madison County non-emergency 911 line. She wanted someone to check on Appellant's well being because he was a diabetic and she believed his sugar was high due to his behavior on the voicemails. She was also afraid that he may try to hurt himself.

Officer Zach Harris of the Richmond Police Department was dispatched to check on Appellant. Harris knocked on the door to Ms. Bowling's house, but no one answered. Harris then walked around the house and encountered the next-door neighbor who said that while Harris was knocking, Appellant ran out the back door. Harris did not pursue Appellant and left the premises.

[1] Three of these messages were played at trial. They were filled with profanity.

When Ms. Bowling arrived in Richmond, but before she arrived at her house, she called 911. After she left work she was informed that Appellant was threatening to kill her and that he had knives laid out.[2] She passed this on to the 911 operator and requested help getting into her house.

Officer Lydia Douglas met Officer Harris at Ms. Bowling's house. Douglas attempted to make contact with Appellant at the front door while Harris stationed himself at the back door. Douglas knocked on the door, but no one answered. She then tried to open the door, but it was locked. At that point, Ms. Bowling arrived at the house. She then opened the door with her key.

When the door opened, Appellant jumped out from behind the door holding two knives. Douglas ordered Ms. Bowling to go to her car and for Appellant to drop the knives. Harris then joined Douglas on the front porch. Appellant did not drop the knives. Appellant did not threaten the two officers, but he was not speaking coherently. Harris recalled at trial that Appellant did ask for them to kill him.

Harris deployed his Taser, but missed. Harris testified that this made Appellant angrier. Appellant then slammed the door, began screaming, and began throwing things inside the house. The officers stepped back and waited for their superiors to arrive. When other officers arrived, they attempted to talk Appellant out of the house. The officers saw Appellant use a gas can to douse the living room and himself with gasoline. After a few minutes, Appellant opened the door

[2] Ms. Bowling was not sure where this new information came from. She testified that it either came from one of the voicemails or from a call from Appellant's mother.

and smoke came billowing out. He then closed the door. Douglas testified that Appellant said he was going to blow up the house. The fire department and EMS were then alerted.

Officers tried talking Appellant out of the house for 30 to 45 minutes. Appellant came out to the front porch screaming and cursing. He sat down in a puddle of gasoline on the porch and kept asking the officers to shoot him. Appellant eventually surrendered. When the officers later entered the residence, they found that the living room carpet was covered in gasoline. They also found that Appellant had punched a hole in the bedroom wall, that he had pushed a dryer against the back door, that he had melted something plastic in the kitchen oven, and that the house was in total disarray.

The house had extensive damage. All of the carpet had to be replaced and the walls painted in order to get rid of the smell of gasoline. Also, there were a few holes in the walls that had to be patched and the master bedroom door had to be replaced. In addition, the entire house and all the furniture had to be cleaned and special air filtration machines had to be brought in to remove the gasoline smell. Testimony at trial indicated that the damage to the dwelling cost $9,338.36 to repair. As for the damage to personal property, the cash value was determined to be $4,538.96.

At trial, the defense called no witnesses, but tried to call into question Appellant's mental competency. The jury convicted Appellant of first-degree criminal mischief, third-degree criminal attempt to commit arson, menacing, and

violation of a DVO. The jury recommended a total sentence of four years'[imprisonment. Appellant was sentenced in accordance with the recommendation. The court also ordered Appellant to pay court costs in the amount of $155 within six months of his release. This appeal followed.

Appellant's first argument on appeal is that the trial court erred when it did not exclude from evidence three voicemails he left to Ms. Bowling. On February 7, 2013, the defense filed a motion in limine requesting the suppression of three recorded voicemails from the phone of Ms. Bowling. The defense objected for three reasons: that the discovery of the voicemails was tardy, that there had been 17 total voicemails but only three were saved, and that the voicemails were overly prejudicial. The trial court did not suppress the voicemails.

As to the timeliness issue, Officer Harris stated in his report on the day of the incident that Ms. Bowling informed him of the 17 voicemails. The prosecution did not disclose that they were in possession of three voicemails and intended to introduce them at trial until approximately two weeks before trial. The prosecution claimed that he did not know about the voicemails until two weeks prior to trial when he interviewed Ms. Bowling. Ms. Bowling then brought them to his attention, he made recordings of the messages, and promptly gave them to defense counsel.

Appellant argues Kentucky Rules of Criminal Procedure (RCr) 7.24(1) requires the Commonwealth to turn over any incriminating statements a defendant has made to a witness. Also, RCr 7.24(9) states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

In this case, Appellant requested that the court prohibit the Commonwealth from introducing the three voicemails into evidence.

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We believe that the trial court did not abuse its discretion in this instance. The defense obtained the voicemails two weeks before trial. During the motion in limine hearing, the defense did not state that it needed more time to examine the voicemails or incorporate them into its trial strategy. The three voicemails, in total, were only about four minutes in length; therefore, the defense would not be heavily burdened by this new evidence. Finally, RCr 7.24(9) gives the trial court multiple options and broad discretion when dealing with this type of issue. It was not unreasonable for the trial court to allow the Commonwealth to introduce these voicemails into evidence.

Appellant also argues the trial court should have excluded this evidence because it violated the "rule of completeness" due to the complete set of 17

voicemails not being available.[3] Kentucky Rules of Evidence (KRE) 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." We believe that the rule of completeness does not apply in this case. The three voicemails introduced into evidence were unedited and complete recordings. Furthermore, this argument has been explicitly rejected by the Kentucky Supreme Court. In *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004), the Court stated:

> KRE 106 is a rule of admission, not exclusion. It allows a party to introduce the remainder of a statement offered by an adverse party for the purpose of putting the statement in its proper context and avoiding a misleading impression from an incomplete document. It does not require the exclusion of a relevant portion of a document because other portions cannot be found.

Id. at 865-866 (citation omitted).

Finally, Appellant argues that the messages should have been excluded because they were not relevant and were too prejudicial. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. "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

[3] Ms. Bowling had deleted all but three of the voicemails prior to trial because her voicemail was full.

considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

All three of the messages contained an excessive amount of profanity aimed towards Ms. Bowling. Two of the messages contained statements made by Appellant that he was going to smash Ms. Bowling's televisions. Appellant argues that only the parts of the messages that mentioned the televisions should have been played for the jury and that the extreme profanity was too prejudicial. We find no abuse of discretion. The three messages were relevant to show Appellant's intent to harm Ms. Bowling and her property. They were also relevant to show Appellant's state of mind. Appellant had no defense to the crimes he was alleged to have committed because he was caught in the act. His only defense was his state of mind. In other words, was he acting intentionally, wantonly, or recklessly when he committed these acts? These messages were relevant to show his intent. Also, while the messages did contain a great deal of profanity, we cannot say that the prejudicial affect of the profanity substantially outweighed the probative value of the messages.

Arguendo, even if this evidence was irrelevant or substantially prejudicial, we find that its admission into evidence was harmless error.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent

> with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

RCr 9.24.

> A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765, 66 S.Ct. 1239.

Winstead v. Commonwealth, 283 S.W.3d 678, 688-689 (Ky. 2009) (footnote omitted).

We do not believe any prejudice from the recordings had substantial influence on the outcome of the trial. The recordings only lasted about four minutes in total and were only a small part of a two-day trial. In addition, as previously mentioned, there was little in the way of a defense Appellant could have put forth. We cannot say that the judgment and conviction of Appellant was substantially swayed by this evidence.

Appellant's next argument on appeal is that the trial court erred in not giving the jury a missing evidence instruction. During the hearing for the motion in limine regarding the voicemails, counsel for Appellant requested that they be given a missing evidence instruction since 14 other voicemails had been erased. The

court indicated it was unwilling to give such an instruction, but would wait until it heard the evidence at trial. After the trial, the court declined to give the instruction. We find no error.

> [T]he purpose of a "missing evidence" instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. . . . Second, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth's failure to collect or preserve *any* evidence. It just means that absent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure.

Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002) (emphasis in original).

Here, there is no evidence of bad faith on the part of the Commonwealth or the police officers. Also, there is no evidence that the missing messages were exculpatory in nature. During the trial, Ms. Bowling testified that the missing messages were similar to the three introduced. Appellant makes no claim or assertion that the messages contained anything exculpatory. We find no error.

Appellant's final argument on appeal is that the trial court erred in assessing him $155 in court costs because he is a poor person and will be unlikely to be able to afford to pay the costs once he is released from prison. This argument was not made before the trial court, but Appellant requests we review it. In the interest of justice, we will do so.

> The taxation of court costs against a defendant, upon conviction in a case, shall be mandatory and shall not be subject to probation, suspension, proration, deduction, or other form of nonimposition in the terms of a plea bargain or otherwise, unless the court finds that the defendant is a poor person as defined by KRS [Kentucky Revised Statutes] 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.

KRS 23A.205(2). "A 'poor person' means a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing." KRS 453.190(2).

The case at hand is similar to *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012). In *Maynes*, Desean Maynes pled guilty to third-degree burglary with a sentence of three years' imprisonment, diverted for five years. He was also ordered to pay $130 in court costs within six months. Maynes objected to the imposition of court costs because he was unemployed and had recently become a father. He argued it would be an undue hardship for him to pay the court costs. He also argued that because he was poor enough to be given a public defender, the cots should have been waived. The Kentucky Supreme Court found that a defendant who was deemed indigent and entitled to representation by the Department of Public Advocacy (DPA) was still required to pay $130 in court costs. The Court held that being indigent for the purposes of representation by the DPA is not the same as being a poor person for the purpose of having court costs waived. The Court also affirmed the Court of Appeals' finding that Maynes

provided no evidence that he was disabled or incapable of working. Finally, the Court found that since Maynes was given six months to pay the costs, "he could reasonably be expected in the near future to acquire the means to pay the relatively modest court costs of $130.00." *Maynes* at 930.

In the case at hand, Appellant does not claim that he is disabled or would be incapable of finding work once he is released from prison. Also, as in *Maynes*, Appellant was given six months to pay the costs. We find no error.

For the foregoing reasons we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Emily Holt Rhorer
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky