

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000961-MR

EVERETT PAUL NORMAN

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 12-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Everett Paul Norman appeals the Pike Circuit Court's judgment convicting him of second-degree manslaughter. After a careful review of the record, we affirm because the circuit court did not err in denying Norman's motion to dismiss the indictment or in its instruction to the jury, and Norman's ineffective assistance of counsel claim was not preserved for appellate review.

I. FACTUAL AND PROCEDURAL BACKGROUND

Norman was indicted on the charge of capital murder for unlawfully shooting Jessie Church and causing his death. He moved to dismiss the indictment on the basis that he was in his home when Church tried to gain entry to Norman's home without Norman's permission, and Norman shot at Church in defense of himself and his home pursuant to KRS¹ 503.085. Norman's motion to dismiss the indictment was denied by the circuit court.

Norman was tried by a jury and ultimately convicted on the lesser included offense of second-degree manslaughter. Norman was sentenced to ten years of imprisonment.

Norman now appeals, contending that: (a) the Commonwealth's evidence was insufficient to show probable cause that Norman's use of force was unlawful; (b) but for the absence of the exculpatory testimony of Kayla Wolford due to defense counsel's failure to investigate or subpoena Wolford, the outcome of this case would have been different; and (c) the circuit court's omission of the "attempt" language from the jury instructions was clear error.

II. ANALYSIS

A. INSUFFICIENT EVIDENCE TO SHOW THAT NORMAN'S USE OF FORCE WAS UNLAWFUL

¹ Kentucky Revised Statutes.

Norman first alleges that the Commonwealth's evidence was insufficient to show probable cause that Norman's use of force was unlawful. Specifically, he contends that the circuit court erred in denying his motion to dismiss the charges pursuant to KRS 503.085 because he was acting in self-defense when he shot the victim.

The Kentucky Supreme Court recently ruled that the appropriate "standard of review in cases involving claims of immunity under KRS 503.085 is . . . whether there was a substantial basis for the trial court's findings."

Commonwealth v. Lemons, 437 S.W.3d 708, 716 (Ky. 2014). In other words, the standard is whether the circuit court had a substantial basis for denying Norman's motion to dismiss. *Id.* at 715. "[A]t each step of the criminal prosecution – defined as arresting, detaining, charging, or prosecuting – there must be probable cause to conclude that the force used [by defendant] was not legally justified, or the case must be dismissed." *Id.* at 714 (internal quotation marks and citation omitted). "Probable cause has . . . been defined as 'reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.'" *Id.* at 715 (internal quotation marks and citations omitted).

Pursuant to KRS 503.085(1),

[a] person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against

whom the force was used is a peace officer, as defined in KRS 446.010. . . . As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.

In the present case, the circuit court noted that

[t]he self defense immunity granted by KRS 503.085 created the only occasion where a Kentucky court may dismiss an indictment before trial over the objection of the Commonwealth. A finding of probable cause that the Defendant’s use of deadly force was unlawful will allow the Commonwealth to proceed to trial.

The circuit court continued, noting as follows:

In this case, the Defendant claims that he received threatening calls from someone he did not know and shot a man whom he did not know. The Defendant claimed that this occurred in the early morning hours while the man he shot was forcing his way into the Defendant’s home without permission. In response, the Commonwealth presented information that the Defendant and the decedent had been at the same party earlier that evening and had talked together. The call received by the Defendant had been from someone at that party whom he would have known. The caller indicated that the decedent and his girlfriend had been fighting and that the Defendant should avoid them. The decedent knocked at the Defendant’s door to ask for a cigarette and while an occupant of the home was lighting a cigarette for the decedent the Defendant shot him. The occupant of the house did not hear anything said nor did he hear any struggle. The decedent’s body was found outside the Defendant’s home.

Therefore, the circuit court found that the Commonwealth had “established probable cause that the use of deadly force was unlawful.”

We agree with the circuit court. Norman claims that following an argument with Kayla Wolford, the victim told Wolford in anger to go to Norman's house and Wolford left the home of Johnny Stewart. The victim left Stewart's home approximately ten minutes after Wolford. Norman claims the decedent then made a telephone call to Norman's house threatening to kill him if he was with Wolford. After the victim and Wolford left, Norman alleges that Brandi Coleman telephoned him "and warned him to lock his doors that 'they' were fighting and might try to cause him harm." Soon thereafter, in the middle of the night, Norman and his house guest, Jesse Collins, allegedly "heard a loud bang on the outside of the home." Norman asserts that he instructed Collins not to open the door, and Norman ran to retrieve his shotgun from the bedroom. In his appellate brief, Norman claimed the following then occurred:

When [Norman] returned to the living room Jesse Collins was not there, and the door was closed. . . . At that moment, a man who was unknown to Everett Norman at that time, opened the door against [Norman's] commands not to enter. . . . And in that second that the door was swung open, with the belief that a man was entering his home at 3 a.m., a man who had not only called and made threats . . . of harm and death, while reaching into his pocket and lunging through the door, as any reasonable person under the same circumstances would, Everett Norman in self-protection, shot [the victim].

However, during an interview with police, Jessie Collins stated that the victim did not knock on the door. Instead, Collins saw him at the door, so he opened it and asked what the victim wanted. The victim asked Collins if he could

have a cigarette. Collins asked Norman if he could get a cigarette for the victim, and Norman said he could. Collins went to the kitchen and was lighting a cigarette from the stove when he heard the gunshot. Collins stated the victim did not come into the house. Collins did not hear Norman or the victim say anything to each other before Norman shot the victim.

Given the disputed facts of this case, there was a substantial basis for the circuit court's decision to deny Norman's motion to dismiss the indictment based on his claim of self defense. Consequently, this claim lacks merit.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Norman next contends that he received the ineffective assistance of trial counsel and that, but for the absence of the exculpatory testimony of Kayla Wolford due to trial counsel's failure to investigate or subpoena her as a witness, the outcome of the case would have been different.

As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, and due to the brief time allowed for making post[-]trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made. This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872-73 (Ky. 1998) (internal citations omitted).

Norman did not preserve this claim by raising it in the circuit court; consequently, we may not review it on direct appeal. *See Humphrey*, 962 S.W.2d at 872-73. Therefore, this claim is precluded.

C. JURY INSTRUCTIONS

Finally, Norman alleges that the circuit court committed clear error when it failed to instruct the jury on the “attempt” language from KRS 503.055(4), so that the jury would know that force could be used against a person attempting to unlawfully and forcibly enter Norman’s residence. The circuit court’s jury instruction concerning self-protection stated, in pertinent part, as follows:

A. If at the time an individual, including the Defendant, uses physical force upon another person he believes that person was then and there about to use physical force upon him, he is privileged to use such physical force against that person as he believes to be necessary in order to protect himself against it, including the right to use deadly physical force but only if:

(1) He believed deadly physical force to be necessary to protect himself from death or serious physical injury;

OR

(2) The person against whom the defensive force was used *was in the process of* unlawfully and forcibly entering a dwelling.

B. A person who is not engaged in an unlawful activity and who is attacked in a place where he has a right to be

has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force if he reasonably believes it is necessary to do so to prevent death or serious physical injury to himself or to prevent the commission of a felony involving the use of force.

(Emphasis added).

The language of the statute at issue, KRS 503.055(4), provides that “[a] person who unlawfully and by force enters or *attempts* to enter a person’s dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.” (Emphasis added).

It is . . . the duty of the trial judge in a criminal case to instruct the jury on the whole law of the case, and this rule require[s] instructions applicable to every state of the case deducible or supported to any extent by the testimony. A criminal defendant is entitled to have every issue of fact raised by the evidence and material to the defense submitted to the jury on proper instructions. However, RCr^[2] 9.54(2) puts the burden on the parties to make their instructional preferences known to the trial judge.

Martin v. Commonwealth, 409 S.W.3d 340, 345 (Ky. 2013) (internal quotation marks and citations omitted).

The Commonwealth argues that Norman failed to provide a statement with references to the record showing that this claim was properly preserved. The Commonwealth claims that after reviewing the conference on the jury instructions, it became apparent that Norman had not preserved this claim for review.

² Kentucky Rules of Criminal Procedure.

We agree that the error is not preserved. Upon our review of Norman's objections during the conference pertaining to jury instructions, Norman did not assert this claim in the circuit court.

Generally, RCr 9.54 prevents the review of an unpreserved error regarding jury instructions. However if an alleged error concerning jury instructions is not preserved for review on appeal pursuant to RCr 9.54, the appellate court may nonetheless review the claim for palpable error pursuant to RCr 10.26 under the guidelines clarified in *Martin*, 409 S.W.3d at 345-46.

Therein, the Kentucky Supreme Court explained when RCr 9.54 bars review of an alleged unpreserved error as compared to when palpable review of such error is proper:

The trial judge cannot be expected to distinguish a neglectful omission from a deliberate choice [of counsel]. Thus, RCr 9.54 imposes upon the party the duty to inform the trial court of its preferences regarding "the giving or the failure to give" a specific jury instruction. Therefore, when the allegation of instructional error is that a particular instruction should have been given but was not or that it should not have been given but was given, RCr 9.54 operates as a bar to appellate review unless the issue was fairly and adequately presented to the trial court for its initial consideration.

We contrast the foregoing circumstances with the situation in which a defendant's assignment of error is not that a particular instruction should not have been given, but that the instruction given was incorrectly stated. Once the trial judge is satisfied that it is proper to give a particular instruction, it is reasonable to expect that the instruction will be properly given. While a timely objection in the trial court is always necessary to preserve the right of appellate review of a defectively

phrased instruction, review under RCr 10.26 is appropriate when an unpreserved error is palpable and when relief is necessary to avoid manifest injustice resulting from a defective instruction. In summary, assignments of error in “the giving or the failure to give” an instruction are subject to RCr 9.54(2)’s bar on appellate review, but unpreserved allegations of defects in the instructions that were given may be accorded palpable error review under RCr 10.26.

Id.

Under the guidance of *Martin*, an improperly given instruction such as the one alleged at hand is appropriate for palpable error review. *Martin*, 409 S.W.3d at 345-46. “A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” RCr 10.26.

Upon review of the instruction given and the statutory language of KRS 503.055(4), we hold that the instruction’s provision that “[t]he person against whom the defensive force was used was *in the process* of unlawfully and forcibly entering a dwelling” conveys the spirit of KRS 503.055(4)’s language regarding “[a] person who unlawfully and by force enters or *attempts* to enter a person’s dwelling.” (Emphasis added). “It is not necessary for the jury instruction to contain an exact replication” of KRS 503.055(4). *Martin*, 409 S.W.3d at 347. Accordingly, the circuit court did not commit palpable error in instructing the jury in this manner.

For the reasons so stated, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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