RENDERED: SEPTEMBER 4, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000515-MR

TYLER PHELPS APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY BURDETTE, JUDGE
ACTION NO. 13-CR-0160

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO, AND THOMPSON, JUDGES.

MAZE, JUDGE: This appeal arises from the Pulaski Circuit Court's Order classifying Appellant, Tyler Phelps (hereinafter the Appellant), as a violent offender during his sentencing hearing for one count of Criminal Solicitation to Commit Murder. We conclude that the trial court correctly classified the Appellant as a violent offender pursuant to KRS[1] 439.3401(1)(c). Also, the trial court

[1] Kentucky Revised Statutes.

properly found that the victim suffered a substantial risk of death and serious and prolonged disfigurement because of the attack, thus fulfilling the definition of serious physical injury in KRS 500.080(15). Therefore, we affirm the Pulaski Circuit Court findings that the Appellant is a violent offender pursuant to KRS 439.3401.

Factual and Procedural Background

The Appellant is the adoptive son of Edwin and Laura Phelps. On an unspecified date, the Appellant solicited Paul S. Young (hereinafter Young) to kill his adoptive parents. On January 16, 2013, around 2:45 a.m., while Edwin was in the bathroom, Young kicked down the bedroom door of Edwin and Laura. When Edwin returned to the bedroom, he heard Laura screaming and saw Young in the bedroom. Edwin yelled at Young, “What are you doing in my house?” to which Young responded, “I’m here to kill you….”

Young then attacked Edwin with a knife. Young stabbed Edwin twelve times in the head and ear, neck, shoulders and back. The Appellant was in the home during the attack but did not participate in the attack. However, the knife used in the attack belonged to the Appellant. An ambulance took Edwin to Lake Cumberland Hospital Emergency Room. Due to the nature of his injuries, he was transferred to University of Kentucky Neurological Unit, where he remained overnight. Edwin suffered a skull fracture, concussion and torn bicep due to the attack. Edwin needed thirty stitches and eight staples to close his wounds. The hospital released Edwin the next afternoon. At the trial, Edwin testified to having

scars on his scalp, shoulder, arm and neck. Because of the ligament damage to his bicep, Edwin is not able to lift as much with his left arm. Since the attack, Edwin has participated in counseling, while Laura has been diagnosed with post-traumatic stress disorder.

Young was arrested at the scene and later told police that the Appellant asked him to murder Edwin and Laura. Thus, on April 9, 2013, the grand jury indicted the Appellant on two counts of Criminal Solicitation to Commit Murder, by promoting, facilitating, commanding or encouraging Young in the criminal attempt to cause the death of Edwin and Laura. On November 21, 2013, the Appellant entered an *Alford*[2] plea to criminal solicitation to commit murder of Edwin. The Commonwealth then dismissed Count 2 of the criminal solicitation to commit the murder of Laura. The Commonwealth also recommended the minimum ten-year sentence of a Class B felony, the maximum being twenty years. KRS 532.060(2)(b). The plea agreement was silent regarding the Appellant's sentencing classification as a violent offender.

During the sentencing hearing on December 13, 2013, the Appellant argued the trial court should not classify him as a violent offender under KRS 439.3401 because the crime of criminal solicitation has no victim. The trial court denied the motion that the crime of criminal solicitation did not have a victim. Furthermore, the Appellant alleged that Edwin's injuries did not qualify as a "serious physical injury" under KRS 500.080(15). The Commonwealth called

[2] *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Edwin to testify about his injuries. The trial court ruled that scarring was permanent disfigurement. Therefore, Edwin received a serious physical injury. Thus, the trial court found the Appellant was a violent offender pursuant to KRS 439.3401, and as a result the Appellant will serve 85% of his sentence before becoming eligible for parole.

Standard of Review

The Appellant asserts his classification as a violent offender is erroneous. The Appellant appeals on two grounds: (1) the crime of criminal solicitation does not have a victim, therefore KRS 439.3401(b) does not apply, and (2) Edwin did not sustain a serious physical injury as defined by KRS 439.3401 and KRS 500.080(15). He raises the argument only with respect to sentencing and not as a basis to withdraw his non-conditional guilty plea under *Alford*. The first issue involves a matter of statutory interpretation. Thus, the standard of review is *de novo*. *Mills v. Department of Correction Offender Information Services,* 438 S.W.3d 328 (Ky. 2014).

Analysis

The Appellant argues the trial court erroneously applied the Violent Offender Statute to his crime of criminal solicitation. KRS 439.3401 lists the classification of crimes that are considered violent offenses:

> (1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of:

> (a) A capital offense;
> (b) A Class A felony;
> (c) A Class B felony involving the death of the victim or serious physical injury to a victim.

A classification under KRS 349.3401 means the offender must serve 85% of his sentence before becoming eligible for parole. KRS 349.3401(3)(1).

Both parties agree that the Appellant committed a Class B felony. However, the Appellant argues the crime of criminal solicitation begins and ends on the agreement to commit the crime. Therefore, in the Appellant's interpretation of criminal solicitation, it does not involve a victim and KRS 349.3401 is inapplicable.

KRS 506.030 defines the crime of solicitation as:

> (1) A person is guilty of criminal solicitation when, with the intent of promoting or facilitating the commission of a crime, he commands or encourages another person to engage in specific conduct which would constitute that crime or an attempt to commit that crime or which would establish the other's complicity in its commission or attempted commission.

The statute outlines the necessary elements to establish criminal solicitation. We note that criminal solicitation is an inchoate crime that does not require an injured or dead victim. *Wyatt v. Commonwealth,* 219 S.W.3d 751, 758 (Ky. 2007).

The Appellant relies heavily on two cases to support his theory of criminal solicitation as a victimless crime. *Putty v. Commonwealth*, 30 S.W.3d 156 (Ky. 2006), and *Wyatt,* 219 S.W.3d 751. The Appellant quotes the assertion in *Putty* that "a conviction of solicitation does not depend upon whether the crime

solicited was actually committed," to bolster his argument that the existence of a victim is irrelevant to the crime of criminal solicitation. *Id.* at 162. Yet the Appellant only quotes part of the passage and the rest explains how the evidence is admissible when it can establish criminal solicitation:

> A conviction of solicitation does not depend upon whether the crime solicited was actually committed. However, by definition, evidence is relevant if it has "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." That the victim of a solicitation to murder was actually murdered is certainly probative of whether the solicitation occurred (assuming the absence of conclusive proof that the murder was unrelated to the solicitation).

Id. While solicitation does not require a victim, evidence that the victim was murdered is relevant to establish the elements of the offense. *Id.* Moreover, since KRS 349.3401 is a sentencing statute, the trial court may consider a broader range of evidence than is strictly necessary to prove the elements of the offense. *See Garrison v. Commonwealth*, 338 SW 3d 257, 259-60 (Ky. 2011).

Likewise, the Appellant uses *Wyatt* to assert there can be no victim in criminal solicitation because the crime of criminal solicitation begins and ends solely on an agreement. 219 S.W.3d at 761. But, in *Wyatt*, the Court held that one person could not be charged with multiple criminal solicitations when only one solicitation was performed. *Id.* at 762. However, the issue at hand is the Appellant's sentencing, not establishing elements of the crime of criminal

solicitation. Like *Putty*, *Wyatt* does not establish that criminal solicitation is a victimless crime nor does it establish the court should ignore the presence of a victim in sentencing.

Rather, the focus in this case is on the application of the Violent Offender Statute. KRS 439.3401 applies to "a Class B felony *involving* the death of a victim or serious physical injury to a victim." (Emphasis added). KRS 439.3401(1)(c). The statute does not distinguish between Class B felonies where the elements of the offense do not involve a seriously injured or dead victim and those that do. *Id.* The wording suggests the legislature intended for extrinsic circumstances revolving around the crime to factor into sentencing, not solely the elements of the crime. Thus, the choice of wording "involving a victim" in KRS 439.3401 conveys that the legislature intended for all Class B felonies involving a victim where death or serious physical injury occurred to fall under this category.

The Appellant next argues that the second part of KRS 439.3401(1)(c) does not apply because the offense must result in "the death of the victim or *serious physical injury to a victim*." (Emphasis added). The Appellant contends that the Commonwealth failed to prove that Edwin suffered a serious physical injury. This issue involves sufficiency of the evidence in support of the trial court's factual finding. "As an appellate court, this Court is not authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court's decision is supported by substantial evidence." *Castle v. Castle*, 266 S.W.3d 245, 247 (Ky. 2008), quoting *Reichle v. Reichle*, 719 S.W.2d

442 (Ky. 1986). *See also* CR[3] 52.01.

KRS 500.080(15) defines serious physical injury as a "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." The issues of contention between the Commonwealth and the Appellant revolve around the substantial risk of death, serious and prolonged disfigurement, and prolonged impairment of health. The prolonged loss or impairment of the function of any bodily organ is not applicable to the case at hand.[4] Each of these elements are in the alternative, thus only one needs to be found to classify the injury as a serious physical injury.

The Commonwealth argues the attack caused injuries that created a substantial risk of death and prolonged disfigurement. To support a finding that there was a serious physical injury, the court evaluates not "what could have happened, but what did, in fact, happen." *Anderson v. Commonwealth,* 352 S.W.3d 577, 583 (Ky. 2011). Also, medical testimony is not required to prove serious physical injury, but instead a layperson can testify to the injuries they received. *Commonwealth v. Hocker*, 865 S.W.2d 323, 325 (Ky. 1993).

Kentucky courts have recognized that skull fractures, knife wounds, attacks that require immediate medical attention, and injuries requiring multiple

[3] Kentucky Rules of Civil Procedure.

[4] The Appellant raised the argument that Edwin did not suffer a prolonged impairment of health. On this element alone, we agree with the Appellant. Like in *McDaniel v. Commonwealth*, 415 S.W.3d 643, 661 (Ky. 2013), the Commonwealth did not put on enough proof to show Edwin was suffering from a prolonged impairment of health.

stiches and staples are sufficient to support a finding of serious physical injury. *Brooks v. Commonwealth,* 114 S.W.3d 818 (Ky. 2003); *Arnold v. Commonwealth*, 192 S.W.3d 420 (Ky. 2006); *Hocker,* 865 S.W.2d 323. In *Brooks*, the attacker stabbed the victim multiple times in the head, neck and arms. *Brooks,* 114 S.W.3d 818. The Court in *Brooks* found the injuries resulting from stab wounds and the medical care sought after the attack supported a finding of serious physical injury. *Id.* at 824.

In *Arnold*, the perpetrator hit the victim in the head with a hammer. Due to the attack, the victim in *Arnold* needed five staples to close the wound and also suffered a concussion. *Arnold*, 192 S.W.3d at 427. In evaluating all the injuries and subsequent pain the victim was in, the Court found the victim suffered a serious physical injury. *Id.* at 427.

In *Hocker,* the victim was beaten and "he sustained a skull fracture as well as hemorrhaging and blood clots from contusions to his head." *Hocker,* 865 S.W.2d at 324. The Court in *Hocker* found the skull fracture, hemorrhaging, blood clotting, and the subsequent medical care all supported a finding of serious physical injury. *Id.* at 325. The Court may also take into consideration the aggressive nature of an attack in finding substantial risk of death. *See Mullins v. Commonwealth,* 2011-SC-000634-MA, 2012 WL 6649199 (Ky. 2012). (Because the injuries of the victim "were not more serious than they actually were does not mean there was not a substantial risk of death created by Mullins's [the defendant's] aggressive attack.")

We agree with the Commonwealth that the attack on Edwin caused a substantial risk of death and serious and prolonged disfigurement sufficient to support a finding of serious physical injury. Young, at the solicitation of the Appellant, stabbed Edwin twelve times with a knife. Most of the stab wounds were to Edwin's head and ear, while some were on his neck, shoulder and back. Edwin also suffered a skull fracture from the incident. These injuries required thirty stitches and eight staples to close. The nature of the attack, the subsequent injuries, and the hospital transfer and monitoring all support a finding of serious physical injury by the trial court.

Furthermore, the trial court found upon viewing Edwin that he had suffered a serious and prolonged disfigurement due to the scarring from the knife inflicted wounds. The Appellant notes that small scars are not enough to find serious and prolonged disfigurement. *Anderson, supra*; *McDaniel, supra*. *Anderson* is distinguished from this case, as the victim received one small scar on his jawline from one stab wound. 352 S.W.3d at 582. Also, in *McDaniel*, the victim had one small scar on her wrist. 415 S.W.3d at 659. In our personal case, Edwin received multiple scars on his body, and pointed to his face where the scars were displayed on his hairline. The trial court took notice and ruled this was a permanent disfigurement. The trial court defined permanent disfigurement as scarring and that conclusion was supported by substantial evidence.

Conclusion

Based on the foregoing, the trial court properly classified the Appellant

as a violent offender and directed that he be required to serve 85% of his ten-year sentence for criminal solicitation to commit murder. Therefore, we affirm the judgment of the Pulaski Circuit Court.

ALL CONCUR.

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