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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-001242-MR

JAMES J. GORMLEY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CR-01001-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: James J. Gormley appeals from a judgment of the Fayette Circuit Court convicting him of evidence tampering and the unauthorized practice of law following a jury trial. He was sentenced to serve terms of five-years' imprisonment and ninety days, respectively -- to run concurrently. His sentence was probated for a period of five years. After our review, we affirm.

On July 6, 2016, loss prevention officers at the Bryan Station Kroger in Lexington detained Jennifer Dunlap for suspicion of shoplifting. Dunlap showed the officers a receipt, but the receipt was from the Beaumont Centre Kroger in Lexington and did not list any of the items that Dunlap was accused of stealing from the Bryan Station store. The officers escorted Dunlap to the supermarket's loss prevention office.

Elizabeth Kanis, then a patrol officer with the Lexington Police Department, responded to the scene. Officer Kanis promptly gave Dunlap the *Miranda* warnings. Officer Kanis placed the receipt that Dunlap had presented to the loss prevention officers on the desk next to her citation book.

Dunlap asked to speak with her attorney. She provided Officer Kanis with a gentleman's name and telephone number. Officer Kanis dialed the number and asked for the man by name. Shortly after Dunlap spoke with the him on the telephone, Gormley arrived at the supermarket. Officer Kanis gave Dunlap the *Miranda* warnings again -- this time in Gormley's presence. Dunlap and Gormley then asked to confer in private. Believing that Gormley was Dunlap's attorney, Officer Kanis allowed them to talk together in the loss prevention office.

Through a window in the office door, Officer Kanis observed Gormley pick up the receipt and hand it to Dunlap. Dunlap folded the receipt and slipped it into her shirt. After Dunlap and Gormley indicated that they had finished

their conversation, Officer Kanis asked that they return the receipt to her. Both Gormley and Dunlap denied having the receipt or having touched it in the loss prevention office.

Officer Kanis cited Dunlap for theft by unlawful taking under $500. When Dunlap asked about seeing the surveillance video footage, Gormley said they would ask for it during discovery. When Dunlap asked for a court date, Gormley told her they would deal with that issue later. Ultimately, Officer Kanis discovered that Gormley was not licensed to practice law.

On November 1, 2016, Gormley was indicted on a misdemeanor charge of unauthorized practice of law and a charge of tampering with physical evidence for taking the receipt. A jury convicted him of both charges. This appeal followed.

On appeal, Gormley presents five arguments: (1) he argues that the trial court erred by denying his mother the right to be present in the open courtroom during *voir dire;* (2) he argues that the trial court erred in its instructions to the jury with respect to the charge of unauthorized practice of law; (3) he contends that the trial court erred by failing to instruct the jury on a paralegal defense; (4) he argues that the court erred by admitting evidence during the penalty phase of trial indicating that he had been ordered to pay restitution as a result of a

prior conviction; (5) he contends that an accumulation of error justifies a reversal of his conviction. We shall address each of these allegations of error.

Gormley argues that the circuit court committed reversible error by excluding his mother from the courtroom during *voir dire,* thereby depriving him of his constitutional right to a public trial. He claims that the alleged error was sufficiently preserved for appeal. We disagree.

At a bench conference during *voir dire,* the prosecutor observed to the trial court that Gormley's mother was present in the courtroom; that the court had issued to her a protective order against Gormley; and that she had indicated that she was there to watch the trial. Defense counsel remarked that Gormley's mother was entitled to watch the proceedings. However, he then stated, "I don't care if she's here or not here." As Gormley's mother was seated among the prospective jurors, the trial court instructed its bailiff to ask whether she was there on her own. The court stated that it did not want Gormley's mother to sit among the jurors and that she could wait in the hallway until the proceedings began. After the bailiff spoke to Gormley's mother, she left the courtroom. Counsel did not object to this process.

The purpose of the right to a public trial is to ensure a fair proceeding. *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *Crutcher v. Commonwealth,* 500 S.W.3d 811 (Ky. 2016). However, it can be waived "when a

defendant fails to object to the closure of the courtroom[.]" *Johnson v. Sherry*, 586 F.3d 439, 444 (6th Cir. 2009), *abrogated on other grounds by Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

While we are extremely cautious to conclude that a criminal defendant has waived a constitutional right, it is plain in this case that counsel consented to the trial court's limited closure of the courtroom to the defendant's mother during *voir dire*. Having consented to the trial court's proposal of a limited closure of a portion of the proceedings, Gormley affirmatively waived any argument on appeal.

Next, Gormley argues that the trial court erred in its instructions to the jury with respect to the charge of unauthorized practice of law. He contends that the trial court's failure to clarify its instruction was an abuse of discretion that denied him of his right to due process of law. We disagree.

Kentucky juries are given "bare bones" instructions. *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006). In a criminal case, the court's instructions to the jury should conform to the language of the statute and be "flesh[ed] out" by counsel in closing arguments. *Parks v. Commonwealth*, 192 S.W.3d 318, 326 (Ky. 2006).

KRS[1] 524.130(1) provides that "a person is guilty of unlawful practice of law when, without a license issued by the Supreme Court, he engages in the

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[1] Kentucky Revised Statutes.

practice of law, as defined by rule of the Supreme Court." The Supreme Court of Kentucky defines the practice of law as

> any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.

Supreme Court Rule (SCR) 3.020.

In this case, the trial court's instructions to the jury abbreviated the rule defining the practice of law to its pertinent portion: "any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court." Defense counsel proposed the addition of the following language to the jury instruction: "It is the behavior, the act of providing services restricted to licensed attorneys, which comprises the offense, not simply the misrepresentation that one is an attorney." The additional language proposed by defense counsel is derived from language included in an unpublished opinion of this Court in *Steadman v. Commonwealth*, 2015-CA-001172-DG, 2017 WL 242708, *2 (Ky. App. Jan. 20, 2017). The trial court declined to expand the instruction as proposed by counsel.

The court's instructions to the jury were sufficient because they conformed to the statutory language. During its closing argument, the Commonwealth identified for the jury the elements of Gormley's behavior that

constituted the unauthorized practice of law. The trial court did not abuse its discretion by limiting its instruction to the statutory language and by refusing to include the more expansive language proposed by counsel.

Gormley's third contention is that the trial court erred by failing to instruct the jury on a paralegal defense. He acknowledges that the issue is not preserved for appeal, but he asks this Court to review for palpable error pursuant to the provisions of RCr[2] 10.26.

A palpable error is one that affects the substantial rights of a party and causes manifest injustice. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). Manifest injustice results in "a repugnant and intolerable outcome[.]" *McCleery v. Commonwealth*, 410 S.W.3d 597, 606 (Ky. 2013). "When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin*, 207 S.W.3d at 5.

The Supreme Court of Kentucky defines a paralegal as a person acting "under the supervision and direction of a licensed lawyer, who may apply knowledge of law and legal procedures" in specific, enumerated ways. SCR 3.700 There was no evidence in this case to indicate that Gormley was acting under the authority of any supervising attorney when he appeared at Kroger to represent

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[2] Kentucky Rules of Criminal Procedure (RCr).

Dunlap. He was not entitled to a paralegal defense instruction. There was no error.

Next, Gormley argues that the court erred by admitting evidence during the penalty phase of trial indicating that he had been ordered to pay restitution in the amount of $783,545.00 following his conviction for conspiracy to commit money laundering, wire fraud, and false swearing in an earlier criminal proceeding. He concedes that this issue is not preserved for appeal, but he again asks this Court to review for palpable error pursuant to the provisions of RCr 10.26.

KRS 532.055(2)(a) provides as follows:

> Evidence may be offered by the Commonwealth relevant to sentencing including: (1) Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor; [and] (2) The nature of prior offenses for which he was convicted. . . .

Gormley contends that the Commonwealth went too far beyond a general description of the nature of his prior convictions when it told the jury the amount of the restitution he had been ordered to pay. He argues that this information was egregiously prejudicial and that it caused manifest injustice. We disagree.

Considering the totality of the evidence heard by the jury, we are not persuaded that the admission of the amount of restitution that Gormley had been ordered to pay following his previous criminal convictions rose to the level of

palpable error. Based upon the breadth of Gormley's criminal history and the overwhelming evidence of his guilt in this proceeding, we hold that there was no palpable error during the penalty phase of his trial.

Finally, Gormley contends that cumulative error justifies a reversal of his conviction. Again, we disagree.

The Supreme Court of Kentucky has found cumulative error only where "individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). If the errors have not "individually raised any real question of prejudice," then cumulative error is not implicated. *Id.* Because the alleged errors in this case did not raise any questions of real prejudice to Gormley, the theory of cumulative error is not applicable. We have found no single error -- thus negating the possibility of cumulative error.

We affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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