

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001353-MR

MONYAL SMITH

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 16-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * * **

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

TAYLOR, JUDGE: Monyal Smith appeals the May 26, 2017, final judgment of the Fulton Circuit Court upon a jury trial finding him guilty of assault in the second degree, violating a domestic violence order (DVO), theft by unlawful taking under \$500, criminal mischief in the third degree, terroristic threatening in the third degree and being a persistent felony offender in the first degree (PFO I). Smith

was sentenced to ten-years' imprisonment and fined \$1,750. After careful review, we affirm in part, vacate in part as concerns the fines, and remand.

The relevant facts are straightforward. Smith's former girlfriend, Latequa Kinney, obtained a domestic violence order (DVO) from the Fulton District Court in June 2016 which prohibited Smith from contacting, or coming within 500 feet of, Kinney. Nonetheless, later in June 2016, Smith forced Kinney from her porch into her home whereupon Smith threatened and assaulted Kinney over a period of several hours. Smith had also cut her several times with a knife. Eventually, Kinney escaped from the residence with her minor children after Smith fell asleep.

Smith was indicted for assault in the second degree, unlawful imprisonment in the first degree, violating a DVO, theft by unlawful taking under \$500, criminal mischief in the third degree, terroristic threatening in the third degree and being a PFO I. A public advocate was appointed for Smith, and the case proceeded to a jury trial on January 27, 2017.

Smith arrived at court late on the morning of the trial. After *voir dire*, Smith's counsel began a hearing in chambers by stating that Smith wished to address the court. Smith then stated he was almost "dysfunctional mentally," and had just gone to the hospital, where he believed personnel thought he was "going crazy." Smith said he was "not healthy right now" and mentioned the person with

whom he had been staying had died on a couch about a week ago. Smith also said he could not find a witness, who he did not name, and asked the court to delay the trial. When asked by the court, Smith stated he had not previously contacted his attorney to discuss these concerns. Smith's attorney told the court she had nothing to add to Smith's statement, other than ambiguously stating that she knew Smith had "some witnesses." The trial court declined to continue the trial, explaining that the request was untimely since the jury was already present and Smith had not discussed the matter with his counsel earlier.

The ensuing trial was extremely brief—the Commonwealth called only Kinney and Hickman Police Chief Tony Grogan, the investigating officer. Smith called his sister as his only witness. Kinney related the violent events which led to Smith's indictment, including allegations that he strangled her to the point of unconsciousness. Chief Grogan testified in relevant part that he was a former EMT whose license had expired, and he then attempted to testify that some of Kinney's wounds were consistent with strangulation. However, Smith's counsel objected to any causation testimony by Grogan since his EMT license had expired. The court sustained the objection but denied Smith's motion for mistrial, instead admonishing the jury to disregard Grogan's causation testimony.

The jury acquitted Smith of the unlawful imprisonment charge but found him guilty of all the other charges. Smith then left the courthouse before the

penalty phase of the case could begin. A bench warrant was issued for his arrest and a new jury was empaneled for his sentencing trial, which was held on May 15, 2017. At the sentencing trial, the new jury recommended ten-years' imprisonment for the assault conviction, 364 days in jail and a \$500 fine each for the DVO violation, theft by unlawful taking and terroristic threatening convictions, and 90 days in jail and a \$250 fine for the criminal mischief conviction. The jury also found Smith guilty of being a persistent felony offender, but that verdict did not impact Smith's sentence since the jury had recommended ten-years' imprisonment on the assault conviction. On May 26, 2017, the trial court sentenced Smith in accordance with the jury's verdict (a total of ten-years' imprisonment and \$1,750 in fines). The trial court granted Smith's request to appeal *in forma pauperis*. This appeal followed.

Smith raises three issues on direct appeal of his conviction, which we shall address in reverse order from that set forth in Smith's brief. First, he argues the court erred by denying his request for a continuance and permitting him to address the court *pro se* on that issue without holding a hearing on whether he had knowingly waived counsel. Second, he contends the court erred by refusing to declare a mistrial after Chief Grogan attempted to offer testimony about the cause of Kinney's injuries. Finally, he contends the trial court erred by imposing fines upon him. The Commonwealth concedes the error regarding the fines.

Smith's continuance argument appears to be two-pronged. First, he argues a continuance was warranted on the merits and second that the court was required to hold a hearing about whether he properly waived the assistance of counsel before permitting him to address the court in person. A trial court has broad discretion in ruling on a request for a continuance. *Hilton v. Commonwealth*, 539 S.W.3d 1, 10 (Ky. 2018). When deciding whether to grant a continuance, the court should consider all relevant factors, among which are the inconvenience to the litigants, witnesses, counsel, and the court. *Id.* at 11. Other relevant factors include the complexity of the case and whether denying the continuance would cause "identifiable prejudice." *Id.* (quotation marks and citation omitted).

In this case, the trial had commenced with the jury present and *voir dire* completed before Smith requested a continuance. The untimely request for a continuance would have created a substantial inconvenience for the parties, the jurors, the court, and the witnesses. Smith did not explain why the request was not made before trial, although he argues that one or more witnesses he wanted to call were not available. Incredibly, he *still* has not identified the witness(es) or provided any affidavits showing what facts the witnesses would have testified to, as is required by Kentucky Rule of Criminal Procedure (RCr) 9.04. Additionally, Smith has not presented any medical documentation showing he was unable to

meaningfully and rationally participate in the trial as scheduled. In short, Smith has not shown identifiable prejudice stemming from the denial of the continuance motion. Moreover, the case was not complex, as shown by its brevity and the paucity of witnesses called to testify. Given the facts and circumstances of this case, the trial court did not abuse its discretion in denying the continuance.

We also reject Smith's related argument that the trial court erred by letting him request a continuance without first conducting a hearing on whether he had knowingly and voluntarily waived his right to counsel. A defendant is presumed to desire counsel's assistance "unless and until he unambiguously indicates otherwise." *Commonwealth v. Martin*, 410 S.W.3d 119, 122 (Ky. 2013). The request to waive counsel must be "sufficiently clear and unambiguous that no reasonable person can say that the request was not made." *Id.* at 122 (quotation marks and citation omitted). Merely filing *pro se* motions or supplementing counsel's representation is insufficient to necessitate a hearing. *Id.* at 123. A trial court is not required to warn against the perils of waiving counsel unless a defendant actually seeks to waive counsel. *Id.* Moreover, ruling on Smith's quasi-*pro se* motion for a continuance did not obligate the court to conduct a hearing since Smith did not seek to waive his right to counsel. *Id.* at 123-24.

In this case, Smith did not unambiguously request to proceed *pro se*, either in whole or part. Smith did not even express *any* dissatisfaction with

counsel. We reject Smith’s argument that a hearing was necessitated simply because Smith briefly addressed the court personally to state why he did not feel prepared for trial. The trial court was not required to conduct a hearing on the voluntariness of a nonexistent waiver. *See, e.g., King v. Commonwealth*, 374 S.W.3d 281, 291 (Ky. 2012) (holding that “the requirement that a defendant unequivocally assert his right to self-representation is a *condition precedent* of receiving a . . . hearing”).

We now address Smith’s argument that the court erred in not granting a mistrial after the testimony of Chief Grogan. A mistrial is an extreme remedy to be utilized only when there is a manifest necessity for relief caused by a “fundamental defect in the proceedings.” *Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009) (citation omitted). We review a trial court’s denial of a mistrial for abuse of discretion. *Id.*

Smith argues that Chief Grogan vouched for and bolstered Kinney’s testimony by attempting to testify that some of her injuries were consistent with strangulation. But Smith did not make that argument before the trial court. Rather, Smith only objected that Grogan was unqualified to give opinion testimony on causation. A party cannot assert specific grounds for objection at trial and entirely new grounds on appeal. *See, e.g., Fairrow v. Commonwealth*, 175 S.W.3d 601, 607 (Ky. 2005). Thus, we may grant relief on the unpreserved “vouching” issue

only if Grogan's testimony was so trial-altering as to create a manifest justice (be a palpable error). RCr 10.26. The challenged testimony falls well below that stringent standard. Grogan did not directly vouch for Kinney's version of events. Instead, at most, his causation testimony indirectly supported Kinney's testimony. The Kentucky Supreme Court has specifically held that "the fact that a jury may have been able to infer that a witness was, at most, indirectly vouching for the credibility of another witness is simply not the stuff from which palpable errors are made." *Harp v. Commonwealth*, 266 S.W.3d 813, 824 (Ky. 2008).

In denying the motion for mistrial, the trial court strongly admonished the jury to disregard Grogan's causation testimony. As a general rule, an admonition is presumed to cure errors and a jury is presumed to follow an admonition to disregard evidence. *Parker*, 291 S.W.3d at 658. We reject Smith's implied argument that those presumptions do not apply in this case because the witness was the local police chief. The jury was presented with substantial evidence of Kinney's injuries and, given the totality of the circumstances, Smith has not shown the trial court abused its discretion when it denied his request for a mistrial.

The final argument on appeal raised by Smith looks to the imposition of the \$1,750 in fines. Smith was represented by a public defender at all stages of the proceeding. Indeed, the trial court granted Smith's request to file this appeal as

a pauper after it had already imposed the fines. Surprisingly, Smith did not object to being fined at sentencing. On appeal, the Commonwealth concedes the fines are improper, and we agree. Kentucky Revised Statutes 534.040(4) prohibits imposing fines for misdemeanor convictions on an indigent defendant, who may seek relief from such fines on appeal even absent a timely objection, provided the error is plain from the face of the record. *Trigg v. Commonwealth*, 460 S.W.3d 322, 333 (Ky. 2015). Because Smith was afforded the services of a public defender and otherwise proceeded as an indigent person at all stages of the proceedings, the fines are a sentencing error which this Court must correct. *Mitchell v. Commonwealth*, 538 S.W.3d 326, 332 (Ky. App. 2017).

For the foregoing reasons, the final judgment of the Fulton Circuit Court is affirmed except as concerns the imposition of fines, for which we vacate and remand for entry of a new judgment without the assessment of fines.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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