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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000755-MR

THOMAS BAILER — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 09-CR-00484

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Thomas Bailer, was convicted of six counts of assault in the third degree and sentenced to imprisonment for a term of six years. Three weeks later, he pleaded guilty to two counts of rape in the first degree, two counts of sodomy in the first degree, and four counts of sexual abuse in the first degree. On these counts, he was sentenced to imprisonment for a term of thirty years.

Immediately following this second sentencing hearing, Bailer threatened four of his family members. Specifically, he stated: "Thirty-six years, six months, I'll get my revenge." The trial judge, who heard this comment, asked Bailer exactly what he meant. Bailer replied that "thirty-six years and six months . . . Linda Cain, Mona Warrington, Bryan Bailer, Terry Cain . . . they will all die by my hand." These four individuals are members of Bailer's family

who had cooperated with police in the investigation against him, and who would have been called as witnesses had the case proceeded to trial.

Based on these threats, Bailer was charged with four counts of retaliating against a participant in the legal process and one count of being a persistent felony offender (PFO) in the first degree. At trial, Bailer testified on his own behalf and essentially explained that he never meant any of the threats. The jury found him guilty of all four retaliation counts and the PFO count and recommended a total sentence of imprisonment for twenty years. Bailer now appeals the judgment, raising two claims of error.

Bailer first claims that the trial court erred by not instructing the jury on terroristic threatening in the third degree. He argues that terroristic threatening in the third degree is a lesser included offense of retaliating against a participant in the legal process. A lesser included offense is "established by proof of the same or less than all the facts required to establish the commission of the offense charged." KRS 505.020(2)(a). "[I]f the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the greater offense, but is simply a separate, uncharged offense." *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000).

As it pertains to this case, a person is guilty of terroristic threatening in the third degree when he "threatens to commit any crime likely to result in death or serious physical injury to another person[.]" KRS 508.080. Under the theory presented to the jury in this case, a person is guilty of retaliating against a participant in the legal process when he

> threatens to engage in conduct causing or intended to cause bodily injury or damage to the tangible property of a participant in the legal process or a person he or she believes may be called as a participant in the legal process in any official proceeding or because the person has participated in a legal proceeding[.]

KRS 524.055.

Both offenses require a threat. Retaliation requires the threat of conduct intended to cause bodily injury or damage to tangible personal property. However, terroristic threatening in the third degree requires that such conduct be criminal, and also that such conduct be likely to cause death or serious physical injury. Because of this additional evidentiary requirement of terroristic threatening in the third degree, it is not a lesser included offense of retaliation against a participant in the legal process. *Cf. Cecil v. Commonwealth*, 297 S.W.3d 12 (Ky. 2009) (terroristic threatening in the third degree is not a lesser included offense of intimidation of a participant in the legal process).

Bailer emphasizes that the evidence in this case would support a finding of guilt on a terroristic threatening charge. Even if true, such would not support the conclusion that terroristic threatening in the third degree is a lesser included offense of retaliation against a participant in the legal process. "The fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser included offense of the charged offense." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). Bailer was not entitled to an instruction on terroristic threatening in the third degree and, accordingly, there was no error.

Next, Bailer claims that the trial court erred by denying his motion to disqualify the judge. Judge Sheehan presided over the sentencing hearing during which Bailer made the threats. At Bailer's arraignment on the retaliation charges arising out of those threats, Judge Sheehan recused himself because he expected to be a potential witness. Chief Judge Patricia Summe appointed herself as special judge to preside over the matter.

Bailer moved for Judge Summe to recuse herself. Relying on KRS 26A.015(2)(e), he argued that her impartiality might reasonably be questioned because Judge Summe works in close proximity to Judge Sheehan. *See* KRS 26A.015(2)(e) (recusal is required where the trial judge "has knowledge of any other circumstances in which his impartiality might reasonably be questioned"). Judge Summe denied the motion, stating that she found "no potential bias nor any circumstance which would reasonably lead to the appearance of bias on the part of the current presiding judge in this case."

"The burden of proof required for recusal of a trial judge is an onerous one." *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001). Bailer has failed to meet this burden. Other than the fact that Judges Sheehan and Summe physically work on the same floor, he points to no specific facts that demonstrate bias. *See Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961) (there must be a showing of facts "of a character calculated seriously to impair the judge's impartiality and sway his judgment"). We do not agree that Judge Summe's impartiality can reasonably be questioned under these circumstances.

Though not raised in his motion to disqualify, Bailer argues on appeal that Judge Summe should have recused because she had "personal knowledge of disputed evidentiary facts concerning the proceedings." KRS 26A.015(2)(a). This claim is based on the fact that Judge Summe, at a hearing on the motion, acknowledged that she had read a pre-sentence investigation report concerning Bailer when she presided over one of his previous assault cases. The previous assault case was used as a prior felony conviction to support the PFO conviction in the present matter. According to Bailer, Judge Summe did, in fact, have knowledge of "disputed evidentiary facts."

We disagree that the prior assault conviction is a "disputed evidentiary fact" within the meaning of KRS 26A.015(2)(a). There is nothing on the record to suggest that the fact of this prior assault conviction was in any way disputed or contested. Recusal was not required because of Judge Summe's knowledge of Bailer's prior assault conviction. It is not uncommon, especially in rural areas of the state, for trial judges to preside over trials of defendants who have previously appeared and been convicted in their courts. Familiarity with a defendant's past, and even the details of prior crimes, does not in and of itself disqualify the judge. Juries, not judges, are normally the ultimate fact finders in criminal cases.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

All sitting. All concur.

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