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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000440-MR

GARY ROBINSON — APPELLANT

V.

ON APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
NO. 10-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Lewis Circuit Court jury found Appellant, Gary Robinson, guilty of complicity to attempted murder. He was subsequently sentenced to twenty years in prison. He now appeals as a matter of right, Ky. Const. § 110(2)(b), alleging reversible error in: (1) the trial court's failure to grant a mistrial after a midtrial car wreck between Appellant and members of the victim's family; (2) the Commonwealth's introduction of inaccurate collateral impeachment evidence concerning the finality of Appellant's divorce from his ex-wife; and (3) the trial court's failure to grant a directed verdict in light of the Commonwealth's alleged failure to establish specific intent to commit murder. For the reasons that follow, we affirm.

I. BACKGROUND

In December 2000, Appellant met and became romantically involved with the future Mrs. Dana Jamison. In 2002, Dana became pregnant and delivered Appellant's child. At some point thereafter, Dana learned that Appellant, whom she had believed to be divorced, was still married and immediately ended their relationship. However, Appellant continued to regularly visit their child. Appellant ultimately divorced his wife in July 2008.

In September 2008, Dana married John Jamison. In December 2009, Dana left John and moved into a motel. Appellant contacted Dana immediately and attempted to rekindle their prior relationship. Instead, after being separated for a few weeks, Dana and John reconciled. When Dana told Appellant about her and John's planned reconciliation, Appellant threatened to kill John.

About two weeks later, on January 15, 2010, Dana and John were lying in bed when someone knocked on their front door. When Dana answered the door, a stranger asked to speak to "the man of the house." Dana returned to her bedroom to get John. Remembering Appellant's threats, and feeling uneasy about the stranger, Dana asked John to take a gun. As John walked to the door, the stranger opened fire on him. John was shot several times but managed to return fire as he fell. The shooter fled. John survived, but at the time of trial remained unresponsive and bedridden.

Wesley Allen, one of Appellant's employees, confessed to being the shooter and pled guilty to attempted murder. According to Allen, Appellant

had hired him to kill John, and plans were made on at least three prior occasions to carry out the murder. However, those prior attempts had been called off for various reasons.

A Lewis County Grand Jury indicted Appellant for complicity to attempted murder and conspiracy to commit murder. During lunch recess on the fourth day of trial (a Thursday) Appellant was involved in an automobile collision with members of John's family. Appellant sustained injuries and was transported to the hospital for treatment and observation; the trial did not resume until the following Monday. Although it appears the incident was nothing more than an accident, Appellant moved for a mistrial citing "rampant" rumors throughout the community in the days following the wreck, and the possibility that the jurors had seen Appellant's "readily identifiable" car at the accident scene.[1] After conducting an individual voir dire of each juror and determining that no jurors were biased by information surrounding the collision, the trial court overruled Appellant's motion for mistrial.

Appellant was ultimately found guilty on the complicity charge and the jury recommended a twenty-year prison sentence. The trial court adopted that recommendation and this appeal followed.

Additional facts will be developed where relevant to our analysis.

[1] To this point in the trial, there had been substantial evidence presented about Appellant's 2010 maroon Chevrolet Camaro. Given the circumstances of the collision, the local police turned the investigation over to the Kentucky State Police (KSP) and left the automobiles in their wrecked positions until the KSP arrived and investigated. The cars were still in their wrecked positions on a heavily-traveled highway after the jurors had been sent home for the day.

II. ANALYSIS

A. Appellant's Motion for a Mistrial

Appellant first argues that the trial court erred by failing to grant his motion for a mistrial after he and members of John's family were involved in the automobile collision. Specifically, he argues that the "rampant" rumors surrounding the incident—including one that Appellant intentionally collided with the other vehicle—likely permeated through the community and reached the jurors, compromising the fairness of the trial. Although we typically review a trial court's ruling on a motion for mistrial for abuse of discretion, *see Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002), the Commonwealth argues that defense counsel implicitly withdrew his motion and therefore waived this claim of error. We agree.

The automobile collision occurred on a Thursday afternoon. Before dismissing the jurors, the trial court issued a strong admonition to the jury to refrain from television, radio, social media, internet usage, gossip, and hearsay. The judge also issued a gag order binding counsel to silence, and forbidding any person in the gallery who was related or connected to the victim's family from conversing with the media. The trial did not resume until the following Monday morning. Before the jury was brought into the courtroom, defense counsel moved for a mistrial, citing the rumors and the possibility that one or more of the jurors recognized Appellant's car at the accident scene. Defense counsel then stated: "Should we not be able to convince you that a mistrial is

needed now, I think we should probably individually voir dire the jurors to determine what in fact they have been subjected to this weekend."

The trial court responded by noting that "the defense's motion is based on an assumption . . . that the jury has been prejudiced. We don't know that. I think before you can say there's a mistrial we have to determine exactly, to what extent, the jurors know—if anything; and even if they knew, if that would prejudice them." Accordingly, the trial court opted to individually question the jurors to determine what they knew about the collision, and whether their knowledge would cause prejudice.[2]

Of the fourteen jurors questioned, only nine knew that there had been a wreck. Of those nine, only four knew that Appellant had been involved in it. Of those four, only one juror had heard the other driver was a member of John's family. That juror had no other knowledge, had formed no opinions, and had heard no rumors. That juror was advised not to discuss the accident with the other jurors. The five jurors who did not know about the accident were not told.[3] Finally, all fourteen jurors stated that they could be unbiased and decide the case based only on the evidence presented in the courtroom.

[2] The individual voir dire occurred in chambers, with both the Commonwealth and defense counsel permitted to question the jurors.

[3] To avoid telling the jurors about the accident, the judge probed the issue by asking the jurors whether they knew why the court had recessed the previous Thursday.

After the individual voir dire, the following dialogue took place outside the presence of the jury:

> *Judge* [to defense counsel]: Do you want to say anything else about your motion [for a mistrial]?
>
> *Defense Counsel:* Judge, we individually voir dired the jurors. It was on the record to the satisfaction of all parties. I'm convinced that all of them not only followed your instructions [to refrain from television, radio, social media, internet usage, gossip, and hearsay], but went above and beyond. Some of them went out of town so they wouldn't have to deal with it. The defense is satisfied with the answers of the jurors.
>
> *Commonwealth:* I have nothing.
>
> *Judge:* I think based upon our conversations with the jurors, all of them indicated that they are still unbiased and have not been affected one bit by the incident that occurred Thursday. So I am going to overrule that motion for a mistrial.

It is clear to this Court that Appellant implicitly withdrew his motion for a mistrial and waived this claim of error. Although defense counsel moved for a mistrial based upon the *assumption* that the rumors in the community surrounding the accident biased the jurors, he clearly indicated that his fears were alleviated by the answers given in individual voir dire. In *Quisenberry v. Commonwealth*, we recognized that "invited errors that amount to a waiver, *i.e.*, invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review." 336 S.W.3d 19, 38 (Ky. 2011) (*citing United States v. Perez*, 116 F.3d 840 (9th Cir. 1997)). We conclude that this is precisely what happened in this case, and therefore hold that Appellant has waived this issue for appeal.

Even if we were to consider Appellant's claim on the merits, we believe the trial court properly overruled Appellant's motion. "A mistrial is appropriate only where the record reveals 'a manifest necessity for such an action or an urgent or real necessity.'" *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. 1993) (*quoting Skaggs v. Commonwealth*, 694 S.W.2d 672 (Ky. 1985)). The trial court probed the possibility of bias individually, in chambers, and in depth. All parties were satisfied that no bias occurred, and that no juror was aware of any rumor in which Appellant intentionally collided with a member of John's family. Indeed, only one juror had heard that the driver of the other vehicle was a member of John's family. We have reviewed the videotaped voir dire and are satisfied that the circumstances surrounding the accident caused no issue whatsoever, much less a "manifest necessity" for granting a mistrial. Defense counsel admitted as much when he stated: "The defense is satisfied with the answers of the jurors." Therefore, even if Appellant had not waived this claim of error, we would have concluded that the trial court did not abuse its discretion.

B. Conflicting Evidence Regarding the Finality of Appellant's Divorce

Appellant next argues that the Commonwealth improperly introduced evidence of a collateral matter in an attempt to impeach a witness's knowledge and Appellant's truthfulness. Specifically, he argues that the introduction of a document purporting to dismiss the couple's divorce action for lack of prosecution should not have been introduced during cross-examination of his

ex-wife, Melinda. Appellant acknowledges that this argument is unpreserved and therefore requests palpable error review. RCr 10.26; KRE 103(e).

Appellant called Melinda to testify regarding his whereabouts on the date of the attempted murder. Defense counsel began by exploring the couple's marital timeline. Melinda testified that the two had been divorced on July 25, 2008. Defense counsel then asked whether she would be surprised to learn that her divorce had been dismissed for lack of prosecution; the question itself surprised Melinda. Defense counsel then informed Melinda that he had learned that no final decree had ever been entered in her and Appellant's divorce case; Melinda was unaware of this.

On cross-examination, the Commonwealth began by asking Melinda follow-up questions about her divorce. She testified that she had received an order dissolving her marriage to Appellant dated July 25, 2008. The Commonwealth then showed Melinda an Order Dismissing for Lack of Prosecution ("the Order") dated October 13, 2009. She testified she had never received a copy of the Order, and confirmed that she had indeed never seen it. The Commonwealth then entered the Order into evidence without objection by defense counsel. During its closing argument, the Commonwealth again mentioned that the divorce had never gone through, but with little elaboration.

As it turns out, Melinda *correctly* believed that her divorce had been finalized, rendering the line of questioning regarding the order dismissing the marriage action for lack of prosecution inaccurate. Although it was not included in the case record until Appellant's reply brief to this Court, a Decree

of Dissolution of Marriage was entered by the Boyd Circuit Clerk on July 25, 2008.[4]

As previously mentioned, we review this unpreserved claim of error for palpable error. RCr 10.26; KRE 103(e). Under the palpable error standard, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." *Id.* "[W]hat a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted).

We conclude that no error occurred here, palpable or otherwise. First, Kentucky Rule of Evidence (KRE) 611(b) permits cross-examination of issues raised on direct examination: "***Scope of cross-examination***. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination." The negative inference of the last sentence of this rule is that the cross-examining party has substantial latitude to follow up on matters actually testified to on direct-examination. *See Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993) (*quoting* Robert G. Lawson, *The Kentucky Evidence Law*

[4] Why the lack of prosecution dismissal was entered in 2009 remains unclear. The 2008 decree was likely just a partial decree of dissolution, with other matters reserved but left unresolved, creating a CR 77.02(2) dismissal for lack of prosecution.

Handbook § 3.20(II) (3d ed. 1993) ("'[W]hile the trial court may not limit cross-examination because it involves matters not covered on direct, it may limit such examination when limitations become necessary to further the search for truth, avoid a waste of time, or protect witnesses against unfair and unnecessary attack.'")).

Here, on direct examination, defense counsel questioned Melinda about her divorce, and informed her that the divorce action was dismissed for lack of prosecution. Clearly, then, Appellant opened the door for the Commonwealth to follow up on this line of questioning. Introducing the actual Order dismissing the divorce action did nothing but confirm what defense counsel had already acknowledged to the witness and to the court to be true (albeit mistakenly). *See Foley v. Commonwealth*, 942 S.W.2d 876, 887-88 (Ky. 1996) (concluding that KRE 611 permitted the Commonwealth to introduce impeachment evidence once the appellant opened the door to a collateral issue).

Second, the prejudice Appellant alleges—i.e., that his credibility was stripped—was not only *invited* by defense counsel on direct-examination, it was *provided* by defense counsel. In his brief, Appellant contends that the Commonwealth introduced the Order to demonstrate that "Appellant is lying, not only to the jury, but to his own wife," and that "if he would lie about being divorced to save money then imagine the lengths he would go [to] get even with the man who married the mother of his child." Without belaboring the point, it was defense counsel that originally revealed to Melinda that her divorce was

dismissed and never finalized. Any prejudicial inference the jury drew regarding Appellant's credibility was therefore initially provided by defense counsel. *See id.* at 888 (holding no prejudice occurred by introducing evidence on a collateral issue because the jury was already aware of the subject matter the evidence was being introduced to prove).

In sum, we hold that Appellant opened the door to questioning Melinda about her divorce, and that introducing the Order dismissing her divorce action for lack of prosecution was therefore permissible under KRE 611(b). Accordingly, no error occurred.

C. Appellant's Motion for a Directed Verdict

Appellant's final argument is that the trial court erred by failing to grant his motion for a directed verdict. Specifically, he argues that a directed verdict was warranted because the Commonwealth failed to present evidence of specific intent, an element of complicity to attempted murder. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (*citing Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983)).

Kentucky's complicity statute, KRS 502.020, provides:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Accordingly, we have stated:

> KRS 502.020 describes two separate and distinct theories under which a person can be found guilty by complicity, *i.e.*, "complicity to the act" under subsection (1) of the statute, which applies when the principal actor's *conduct* constitutes the criminal offense, and "complicity to the result" under subsection (2) of the statute, which applies when the *result* of the principal's conduct constitutes the criminal offense . . . .

Tharp v. Commonwealth, 40 S.W.3d 356, 360 (Ky. 2000). Here, we are dealing with subsection (1) because Wesley Allen's *attempt* to kill John Jamison—that is, Allen's *conduct*—constitutes the criminal offense. As we have previously recognized, a person can only be convicted under subsection (1) "if he/she possesses the *intent* that the principal actor commit the criminal act." *Rogers v. Commonwealth*, 315 S.W.3d 303, 310 (Ky. 2010).

While Appellant acknowledges that "[t]he jury is allowed reasonable latitude in which to infer intent from the facts and circumstances surrounding the crime," *Simpson v. Commonwealth*, 759 S.W.2d 224, 226 (Ky. 1988) (*citing Peace v. Commonwealth*, 489 S.W.2d 519 (Ky. 1972)), he contends that there was no evidence that he intended that John Jamison die. We disagree.

First, the Commonwealth presented the testimony of Dana Jamison. Dana described how two weeks before the attempted murder, she told Appellant that she was reconciling with and moving back in with John. She testified that Appellant reacted to this information by saying: "If you're going home [to John], I'll have you both killed." He then added that he could not have the mother of his son killed, "but John's a dead man."

The Commonwealth presented evidence that the shooter, Wesley Allen, stayed at a motel near John and Dana's home the nights of January 8, 9, and 14, 2010. Allen testified that Appellant originally offered him $25,000 and a truck to kill John in 2008 or 2009. That offer apparently remained open through two subsequent attempts that were called off, and for the January 15, 2010 shooting.

The day before the shooting, January 14, 2010, Appellant gave Allen a .40 caliber Glock with which to shoot John. Allen visited John's home that day in an attempt to carry out the shooting but nobody answered the door. When Allen told Appellant that nobody had answered the door, Appellant became upset and told Allen that John had "to go down." He then told Allen that the

following day, January 15, 2010, they were going to "go up there and clean that hollow out."

The next morning, Appellant picked up his son from Dana and John's home and took him to school, allegedly to make sure that he would not be in the home when the shooting occurred. He then met Allen at a service station; a security camera captured pictures of Appellant and Allen together at the service station forty-five minutes before the shooting. Appellant told Allen: "Go do what you got to do." Allen understood this as meaning that he was supposed to go kill John.

Ron Cox, a Pepsi deliveryman who was acquainted with Appellant, was at the service station that morning. Cox recognized Appellant and began to speak with him. During their conversation, Appellant told Cox that he had been having trouble with John and that "he might have to end up killing him."

After filling his gas tank, Allen proceeded to the Jamison home. He testified that his "reason for going to John's house was to kill him." Dana answered the door and Allen asked to see John. When John appeared, Allen opened fire on him; Allen did not know how many shots he fired. Allen ran to his vehicle and John attempted to pursue him. When Allen looked back at the door, John was leaning out pointing his gun toward Allen. Allen turned and fired two more shots in John's direction. A police detective later discovered ten bullet casings from Allen's gun.

After the shooting, Allen met Appellant in a secluded area and placed the pistol on the passenger seat of Appellant's car. Appellant asked Allen: "Did he

go down?" Allen told him that he had. Appellant gave Allen enough money to pay off his car and left; Allen was supposed to receive the additional $25,000 at work the following Monday.

Presented with this evidence, it would not be clearly unreasonable for a jury to infer that Appellant intended that Allen murder John Jamison. *See Benham*, 816 S.W.2d at 187. Accordingly, the trial court did not err by denying Appellant's motion for a directed verdict.

III. CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction and corresponding sentence.

Minton, C.J., Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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