

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002231-MR

THEODORE ANTHONY MARAS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 11-CR-000280

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND THOMPSON, JUDGES.

DIXON, JUDGE: Theodore Anthony Maras appeals from the November 9, 2011, judgment of conviction and sentence of the Jefferson Circuit Court, which found him guilty of one count each of first-degree stalking and violation of a protective order and sentenced him to a total of five years' incarceration. We affirm in part, reverse in part, and remand.

In 2008, a domestic violence order (“DVO”) was entered against Appellant on behalf of Christina Potter. The DVO prohibited contact with Potter and further ordered Appellant to remain at least 600 feet from Potter and her family. In November of 2010, Appellant left a note on Potter’s door indicating that he missed her and wished to speak to her. In addition, Appellant left a box of items, including the barrel from a sawed off double barrel shotgun. Several days later, Appellant was discovered waiting near Potter’s home, armed with a sawed off shotgun. Potter took the gun from Appellant. While at work, Potter discovered that Appellant had left notes on her vehicle, and that Appellant was parked near her place of employment. Appellant again sought to speak with Potter outside of her daughter’s home. The police were dispatched and Appellant was arrested.

Appellant was indicted for being a felon in possession of a firearm, first-degree stalking, violation of a protective order, and being a first-degree persistent felony offender. A jury found him guilty of first-degree stalking and violating a protective order, and recommended a total sentence of five years. Appellant then filed a motion for a judgment notwithstanding the verdict (“JNOV”). Therein, Appellant alleged that the jury had failed to find an essential element for the offense of first-degree stalking and that he was therefore entitled to a JNOV. In the alternative, Appellant requested a new trial. Appellant’s motion was denied and on November 9, 2011, a judgment of conviction and sentence was entered, sentencing Appellant to a total of five years. This appeal followed.

Appellant's first argument on appeal is that the trial court erred when it denied his motion for a JNOV after discovering that the jury convicted Maras of stalking under a theory that is not an offense under the penal code. Appellant's argument stems from a series of events which took place during and after jury deliberations. Our understanding of those events is as follows: during deliberations, the jury requested clarification from the trial court with regard to the instructions it was given. The trial court, after consulting with counsel on both sides, sent a note to the jury indicating that no further clarification could be provided. Thereafter, the jury returned its verdict of guilty on both counts. Appellant alleges that, after the jury was discharged from its duties, several jurors informed the trial judge that they could not unanimously agree on an element of one of the charges. Specifically, the allegation is that the jurors could not agree as to whether Potter was in fear for her own safety, but did agree that she feared for the safety of others.

The statute governing first-degree stalking reads as follows:

- (1) A person is guilty of stalking in the first degree,
 - (a) When he intentionally:
 - 1. Stalks another person; and
 - 2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:
 - a. Sexual contact as defined in KRS 510.010;
 - b. Serious physical injury; or
 - c. Death; and

(b) 1. A protective order has been issued by the court to protect the same victim or victims and the defendant has been served with the summons or order or has been given actual notice; or

2. A criminal complaint is currently pending with a court, law enforcement agency, or prosecutor by the same victim or victims and the defendant has been served with a summons or warrant or has been given actual notice; or

3. The defendant has been convicted of or pled guilty within the previous five (5) years to a felony or to a Class A misdemeanor against the same victim or victims; or

4. The act or acts were committed while the defendant had a deadly weapon on or about his person.

Kentucky Revised Statutes (KRS) 508.140. Appellant contends that the jury, due to its inability to agree that Potter was in fear of her own safety, inadvertently charged him with a crime that does not exist in Kentucky. We disagree.

The jury in this case did not charge (or convict) Appellant with a crime that does not exist; it convicted him of stalking in the first degree. This fact is conclusively supported by the record. Additionally, there are no allegations that the instructions submitted to the jury were improper. Thus, Appellant's argument is essentially that the jury's verdict was a mistake due to misinterpretation of the jury instructions. However, it has long been held that a verdict may not be impeached by a juror's post-trial statements. Kentucky Rules of Criminal Procedure (RCr) 10.04; *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004).

This tenet has been extended to include situations in which a juror misunderstood the elements required to convict a defendant. *Bowling*, 168 S.W.3d at 8.

Accordingly, Appellant's argument is without merit.

Appellant's second, and final, argument on appeal is that the trial court committed reversible error during the sentencing phase by permitting the Commonwealth to introduce inadmissible and prejudicial information concerning Appellant's prior convictions of wanton endangerment, reckless driving, and harassment. Appellant agrees that this argument was not properly preserved for our review. However, we may review an unpreserved "palpable error which affects the substantial rights of a party" and grant appropriate relief if we determine that "manifest injustice has resulted from the error." RCr 10.26. A party claiming palpable error must either show the probability of a different result or an error so fundamental as to threaten his or her entitlement to due process of law. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky.2006).

KRS 532.055(2)(a) provides for the admission of prior offenses during the sentencing phase. However, introduction of such information is not without limits. The Supreme Court of Kentucky has previously held "that the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011). The Supreme Court specified that "[t]he trial court should avoid identifiers, such as naming of victims, which might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes." *Id.*

Therefore, the Court established a “bright line” rule and held that “the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed.” *Id.* Additionally, the Court suggested the conveyance be done by the trial court judge and “either by a reading of the instruction of such crime from an acceptable form book or directly from the [KRS] itself.” *Id.* In the case presently before us, it was Potter who testified as to Appellant’s previous crimes, commenting both on the details of the crimes and her status as the victim. Because this manner of introduction was in direct contravention, both in form and content, to the standards set forth in *Mullikan*, it was a palpable error resulting in manifest injustice. 341 S.W.3d 99.¹ Accordingly, we reverse and remand for re-sentencing.

Based on the foregoing, we affirm Appellant’s convictions but reverse the imposed sentence and remand for a new penalty phase consistent with this opinion.

ALL CONCUR.

¹ We do not find the Commonwealth’s argument that sentencing here is harmless because Appellant has pled guilty to another offense in which he has received a sentence of five years to run concurrently to this conviction. The possibility of future ramifications from this sentence exists as to parole eligibility, at a minimum.

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