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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002189-MR

BILLY LINDSEY — APPELLANT

v.

APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
INDICTMENT NO. 05-CR-00012

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Billy Lindsey appeals from his conviction of complicity to commit third-degree burglary and complicity to commit second-degree criminal mischief. He asserts that the trial court failed to properly instruct the jury on his duress defense and that the court improperly denied his motion for a directed verdict on

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

the complicity to commit criminal mischief in the second-degree charge. After careful review, we affirm.

On July 23, 2004, Lindsey was at his son and daughter-in-law's apartment with Ron Smith, Donnie Cannon, and Sammy Patton. Donnie Cannon had a plan to break into the Prescription Shoppe, and he requested the help of Lindsey and his daughter-in-law, Julie. Lindsey alleges that he and Julie declined, but Cannon threatened to duct tape Lindsey's grandson to his highchair and further struck Julie in the face to get them to cooperate. The clear facts are that Lindsey and Julie drove Cannon to the Prescription Shoppe and provided him with various tools he needed to accomplish the burglary. Cannon gained entry to the Prescription Shoppe through a hole he cut in the roof, but he set the alarm off when he approached the safe and fled with nothing.

Lindsey and Julie gave statements to the police in which they admitted involvement in the burglary but also alleged that Cannon threatened them. On February 25, 2005, an Edmonson County Grand Jury indicted Lindsey for complicity to commit third-degree burglary, complicity to commit second-degree criminal mischief, and PFO in the second-degree. On July 19, 2006, he appeared in court for trial and was found guilty by a jury of complicity to commit third-degree burglary and complicity to commit second-degree criminal mischief and sentenced to 10 years imprisonment. This appeal followed.

Lindsey first requests a new trial to correct the trial court's failure to issue the proper jury instructions on his defense of duress. Lindsey admits that this issue is

unpreserved, but seeks review for palpable error under RCr[2] 10.26, which provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." To prevail upon a claim of palpable error one must show that the error resulted in "manifest injustice." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). The error must be so serious in nature that left uncorrected, it seriously would affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). Furthermore, an error will not be deemed palpable unless the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003).

The statute governing the defense of duress, KRS[3] 501.090, states that, "it is a defense that the defendant engaged in the proscribed conduct because he was coerced to do so *by the use of, or a threat of the use of, unlawful physical force against him or another person* which a person in his situation could not reasonably be expected to resist." (Emphasis added). The jury instructions offered in this case, however, state in pertinent part: "Donnie Cannon coerced him to aid and assist in committing a burglary and criminal mischief by *threatening his life* if he did not do so." (Emphasis added). We

[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Revised Statutes.

agree with Lindsey that the instructions do not conform to the law of the defense and were, accordingly, erroneous.

The Commonwealth argues, however, that since defense counsel proposed these instructions and never objected to them, the issue should be barred under RCr 9.54(2), which states, "[n]o party may assign as error the giving or failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection." Under the facts at bar, and based upon the Supreme Court's handling of a substantially identical situation in *Davis v. Commonwealth*, 967 S.W.2d 574 (Ky. 1998), we agree.

In *Davis*, Sherman Davis and his co-defendant were charged in, and eventually convicted for, the death of their two year old daughter. At trial, with respect to the homicide charge, the jury was instructed on wanton murder with lesser included offenses of second-degree manslaughter and reckless homicide. During the discussion of proposed jury instructions, Davis's attorney urged the trial court not to instruct the jury on first-degree manslaughter, and the court agreed not to do so. However, in his direct appeal to the Supreme Court, Davis argued the trial court erred in failing to instruct the jury on the offense of first-degree manslaughter. As the issue was not preserved, Davis sought review of the alleged error under RCr 10.26. In rejecting Davis's argument, the Supreme Court stated "[w]e decline to [review this issue], because not only was any error

in the trial court's failure to so instruct the jury unpreserved, *it was also waived by Davis's counsel's request that no such instruction be given.*" (Emphasis added).

We are unable to distinguish the present case from the instructions at issue in *Davis*. Here, as in *Davis*, the trial court instructed the jury precisely as requested by defense counsel. As such, we believe this case falls squarely within the rule established in *Davis* that erroneous instructions instigated by the efforts of defense counsel will not be reviewed under RCr 10.26, but, rather, review of such error will be deemed barred by waiver. We note that while we decline to review the issue for palpable error, Lindsey retains the remedy of seeking post-conviction relief under RCr 11.42.

Lindsey contends that he was entitled to a directed verdict upon the charge of complicity to commit criminal mischief in the second-degree. Lindsey alleges that the Commonwealth failed to prove that the damage to the drug store caused a pecuniary loss of $500.00 or more.

KRS 512.030(1) provides that "[a] person is guilty of criminal mischief in the second degree when, having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of $500 or more." Lindsey alleges that the shop owner testified and documented that he had to expend only $475.00 to repair the damage caused by the break-in, and, therefore, the pecuniary loss suffered fell below the $500.00 threshold required for conviction of complicity to commit criminal mischief in the second-degree.

When ruling on a motion for a directed verdict of acquittal, the trial court is required to consider all evidence presented in the light most favorable to the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991). On appeal, the standard of review is whether or not it was clearly unreasonable for the fact-finder to find guilt. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky.1983).

While it is true that the shop owner testified that he had to expend only $475.00 to have the break-in damage repaired, he also testified to the effect that he had to bring in several employees to help clean up the mess left in the store after the burglary, and that when the clean-up costs were taken into account, the total damage was over $500.00.

Given that the documented cost of repairing the break-in damage alone was $475.00, viewing the evidence in the light most favorable to the Commonwealth, once clean-up costs are considered, it was not clearly unreasonable for the jury to find that the total pecuniary loss was $500.00 or more.

For the foregoing reasons the judgment of the Edmonson Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

LAMBERT JUDGE, CONCURS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, CONCURRING: While we decline to review the issue for palpable error, I note, as did my fellow judges, that appellant retains the remedy of seeking post-conviction relief under RCr 11.42.

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