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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000996-MR

MATTHEW M. SPENCER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CR-001192

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Matthew M. Spencer has appealed from the judgment of the Jefferson Circuit Court convicting him of second-degree assault and tampering with physical evidence. He was sentenced to thirteen years' imprisonment. On appeal, Spencer challenges the validity of Kentucky Rules of Criminal Procedure (RCr) 9.40, which provides for peremptory challenges, as well as the description of

“justification” as a “privilege” in the jury instructions. Because both of these issues were unpreserved, Spencer seeks review pursuant to the palpable error rule, RCr 10.26. We affirm.

In April 2011, the Jefferson County grand jury indicted Spencer on one count of first-degree assault or complicity to first-degree assault pursuant to Kentucky Revised Statutes (KRS) 508.010 and KRS 502.020, as well as one count of tampering with physical evidence pursuant to KRS 524.100. These charges arose from events several months earlier in January 2011, when Spencer, acting alone or in complicity with others, stabbed Jody Hill with a knife following a heated telephone argument and washed the blood evidence from the knife to prevent the police from using it as evidence. At trial, Spencer presented a self-defense theory.

Following the trial, a jury returned a verdict finding him guilty of second-degree assault and of tampering with physical evidence. The jury then recommended a ten-year sentence for the assault conviction and a three-year sentence for the tampering conviction, to be served consecutively for a total of thirteen years. Spencer filed a motion for a judgment notwithstanding the verdict or for a new trial on the basis of several trial errors, including the court’s ruling on his request to play the entirety of the recorded in-car video made during the arrest and investigation, improper questions to the court clerk regarding Spencer’s offenses, the lack of tampering evidence, and the denial of his motion to use his

proposed jury instructions.¹ Following a sentencing hearing, the trial court entered a final judgment on May 7, 2012, finding Spencer guilty of second-degree assault and tampering with physical evidence and sentencing him to thirteen years' imprisonment pursuant to the jury's recommendation. By separate order entered the same day, the court denied Spencer's post-trial motions, but granted him leave to proceed *in forma pauperis* on appeal and appointed the Louisville Metro Public Defender to represent him. This appeal follows.

On appeal, Spencer raises two issues. The first addresses the constitutionality of RCr 9.40 and KRS 29A.290(2)(b) based upon a purportedly improper delegation of legislative authority. The second addresses language in the jury instructions. Because these issues were not preserved, Spencer requests that this Court review the issues for plain error pursuant to RCr 10.26.

RCr 10.26 defines a palpable error as an “error which affects the substantial rights of a party [that] 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.”

In *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), the Supreme Court of Kentucky recently described the palpable error standard of review: “This Court reviews unpreserved claims of error on direct appeal only for palpable error. To prevail, one must show that the error resulted in ‘manifest injustice.’”

¹ None of the purported errors addressed the issue that is raised in this appeal.

While the language of RCr 10.26 and Federal Rule of Criminal Procedure 52(b) differ substantially, and recognizing that this Court is not obligated to follow [*United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)], we nevertheless believe it to be a valuable guide in the application of our palpable error rule. To discover manifest injustice, a reviewing court must plumb the depths of the proceeding, as was done in *Cotton*, to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.

Martin, 207 S.W.3d at 4. *See also Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (holding that palpable error relief is not available unless three conditions are present: 1) the error was clear or plain under existing law; 2) it was more likely than ordinary error to have affected the judgment; and 3) it so seriously affected the fairness, integrity, or public reputation of the proceeding to have been jurisprudentially intolerable). With this standard in mind, we shall address Spencer's unpreserved arguments.

Spencer's first argument relates to the validity of RCr 9.40. With this rule, the Supreme Court of Kentucky set forth the number of peremptory challenges the parties in a felony criminal trial are entitled to:

(1) If the offense charged is a felony, the Commonwealth is entitled to eight (8) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.

(2) If one (1) or two (2) additional jurors are called, the number of peremptory challenges allowed each side and each defendant shall be increased by one (1).

(3) If more than one defendant is being tried, each defendant shall be entitled to at least one additional peremptory challenge to be exercised independently of any other defendant.

As Spencer states in his brief, the Supreme Court's authority to adopt RCr 9.40 is found in KRS 29A.290(2):

(1) The voir dire examination of petit jurors shall be conducted in the manner prescribed by the Supreme Court.

(2) The parties shall have the right to challenge jurors as follows:

(a) There shall be an unlimited right to challenge jurors for cause; and

(b) The number of peremptory challenges shall be prescribed by the Supreme Court.

(3) The judge may select alternate jurors. The procedures for the use of alternate jurors shall be prescribed by the Supreme Court.

KRS 29A.290 (emphasis added).

Spencer's argument is that KRS 29A.290 is invalid because in creating the statute, the General Assembly improperly delegated its legislative duty to alter the common law to a judicial body. More specifically, he asserts that the question of peremptory strikes is one of substantive law and therefore beyond the "practice and procedure" authority granted to the Supreme Court in § 116 of the Kentucky Constitution.² Rather, § 28 of the Kentucky Constitution makes the

² "The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar." Ky. Const. § 116.

power of the General Assembly over substantive law exclusive.³ The number and existence of peremptory challenges, if different from the common law, must be established by the General Assembly. And the common law only permitted peremptory challenges for the accused, not the prosecution. RCr 9.40 provides the Commonwealth with eight or nine peremptory challenges. Accordingly, because KRS 29A.290(2)(b) cannot serve as authority for the Supreme Court to fix the existence and number of peremptory challenges, Spencer argues that the Supreme Court did not have jurisdiction to enact RCr 9.40. Because the prosecution in this case was awarded nine peremptory challenges, the jury was improperly selected, entitling Spencer to a new trial.

On the other hand, the Commonwealth argues that the circuit court's following of RCr 9.40 cannot be reversible error because the rules of criminal procedure "govern procedure and practice in all criminal proceedings in the Court of Justice." RCr 1.02(2). Furthermore, the Commonwealth cites to *Commonwealth v. Hillhaven Corp.*, 687 S.W.2d 545 (Ky. App. 1985), for the proposition that this Court, as an intermediate appellate court, is limited in its review to determining whether the action was erroneous under the rules. The Commonwealth goes on to dispute the merits of Spencer's argument, stating that the common law on peremptory challenges was no longer in force under Kentucky

³ "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ky. Const. § 28.

Constitution § 233⁴ once the common law had been supplanted by acts of the General Assembly. The Commonwealth also points out that KRS 29A.290 became effective the day after the General Assembly adopted the version of the criminal rules, including RCr 9.40, in which the General Assembly set an initial number of peremptory challenges for both parties. Moreover, the General Assembly had also included a rule explaining the purpose of the criminal rules in RCr 1.04: “The Rules of Criminal Procedure are intended to provide for a just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.” Based upon these circumstances, the Commonwealth asserts that any delegation to the Supreme Court was not unfettered.

In addition, the Commonwealth points out that Spencer’s rights were not limited in any way because he was able to use the peremptory challenges allowed to him. He also did not argue that an unqualified juror sat on his jury.

We must agree with the Commonwealth’s position in the present matter. As we stated in *Hillhaven*, “we do not sit as a policymaking body. Our function in this instance is to construe the rules and the common law[.]” 687 S.W.2d at 547. Furthermore, we agree that the General Assembly did not improperly delegate its legislative duty to the Supreme Court in the area of

⁴ “All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly.” Ky. Const. § 233.

peremptory challenges. We perceive no constitutional infirmities in either KRS 29A.290 or RCr 9.40. The circuit court properly followed RCr 9.40 in permitting each party nine peremptory challenges in the trial of this matter. Therefore, we find no plain or palpable error under the current law.

For his second argument, Spencer contends that the circuit court improperly instructed the jury regarding self defense, describing this right as a privilege. Because this error was not preserved, Spencer relies on *Elery v. Commonwealth*, 368 S.W.3d 78, 89 (Ky. 2012). In *Elery*, the Supreme Court addressed the preservation of error related to jury instructions:

Before turning to the merits of Appellant's claim, there is some question whether he preserved this error for appellate review. He tendered an instruction to the trial court, which is ordinarily sufficient to preserve an instruction error for review. *See* RC[r] 9.54; *Holland v. Commonwealth*, 114 S.W.3d 792, 803 (Ky. 2003). But Appellant's tendered instruction made the same error about which he now complains. His tendered instruction allowed the jury to find him guilty if and only if it believed beyond a reasonable doubt that he was acting under the influence of extreme emotional disturbance. Though his instruction described this as why the jury would not have found him guilty of murder, the conditioning of the finding on "evidence beyond a reasonable doubt" required the same finding as the instruction ultimately used by the trial court. No doubt, Appellant's confusion about what should go in the instruction was part of a persistent confusion among the bench and bar about how to instruct on first-degree manslaughter, which is described in more detail in the next issue below.

But Appellant also separately objected to the trial court's instruction and complained that it required an improper finding—the existence of EED—before the

jury could find him guilty of manslaughter instead of murder. The gravamen of the instructional-error preservation requirement is presentation of the party's position "fairly and adequately" to the trial judge. RCr 9.54(2). While this is normally done by tendering an instruction, it may also be done by an objection "stating specifically the matter to which the party objects and the ground or grounds of the objection." *Id.*

Our reading of *Elery* does not support Spencer's request for a plain error review in this case. Rather, *Elery*'s holding is more akin to the Supreme Court's holding in *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011):

[A] defendant cannot seek reversal of his conviction on the basis of an improper jury instruction where the instruction given was the instruction he requested. *Mason v. Commonwealth*, 565 S.W.2d 140, 140 (Ky. 1978). In *Mason*, the defendant tendered proposed insanity instructions, which were identical to the instructions ultimately given by the trial court. *Id.* The defendant was convicted and, on appeal to this Court, he asserted that the trial court's insanity instructions were erroneous and warranted reversal. *Id.* We affirmed the defendant's conviction holding that he was precluded from complaining of the content of the instruction because it was identical to the instruction he requested. *Id.*; see also *Commonwealth v. Southwood*, 623 S.W.2d 897, 897 (Ky. 1981) (following *Mason*).

In this case, the trial court gave the first-degree manslaughter instruction Appellant tendered. As a result, he is barred from arguing it as a basis on this appeal to reverse his conviction.

Pursuant to this case law, Spencer is precluded from seeking reversal of his conviction on the basis of an improper jury instruction if it is the same instruction he requested the court to use.

Here, Spencer tendered proposed instructions that included the identical language the circuit court used related to self-protection. In Spencer's Instruction No. 1A – Self Protection, he proposed the following language be used:

You are instructed that if at the time Matthew Spencer used physical force upon Jody Hill, he believed that he was then and there about to use physical force upon him, he is privileged to use such physical force against Jody Hill as he believed to be necessary in order to protect himself against it, including the right to use deadly force but only if he believed deadly force to be necessary to protect himself from death or serious physical injury.

A person who is not engaged in an unlawful activity and who is attacked in a place where he has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

In the remainder of the tendered instructions for assault, Spencer consistently used the language, “privileged” or “not privileged to act in self-protection.” The trial court's instruction on self-protection read as follows:

If at the time Mr. Spencer caused injury to Mr. Hill, he believed that Mr. Hill was then and there about to use physical force upon him, he is privileged to use such physical force against Mr. Hill as he believed necessary to protect himself again it, but including the right to use deadly physical force in so doing only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hands of Mr. Hill.

However, if you believe from the evidence beyond a reasonable doubt that Mr. Spencer, was the initial aggressor in the use of physical force, then the privilege

of self-protection is not available to him, unless: his initial physical force was non-deadly and the force returned by Mr. Hill, if any, was such that Mr. Spencer believed himself to be in imminent danger of death or serious physical injury.

For the assault instructions, the trial court also consistently used the language “privileged” or “not privileged to act in self-protection.” The Commonwealth points out that the language used is the same as that used in the form instruction found in 1 Cooper and Cetrulo, *Kentucky Instructions to Juries, Criminal* (5th Ed. 2011). Therefore, Spencer is not permitted to argue that he is entitled to a reversal on this issue, and he has not established plain or palpable error in this regard.

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

ALL CONCUR.

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