

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000249-MR

JIMMY BOWLIN

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 00-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

BARBER, JUDGE: Appellant, Jimmy Bowlin (Bowlin), files a direct appeal of his conviction. We reverse the conviction below.

Bowlin was indicted for terroristic threatening, wanton endangerment, possession of drug paraphernalia, drug possession and cruelty to animals following Bowlin's having repeatedly discharged his SKS rifle near his trailer. During his firing of the gun, Bowlin shot his dog. Bowlin claimed to have shot the dog by accident. When Bowlin reentered the home

between bouts of shooting, the officers on the scene claimed that he had threatened a woman inside the residence. The officers were hiding in the woods outside the trailer at the time the argument was overheard. Bowlin denied having threatened the woman. The woman denied that she had been threatened.

Officers at the scene testified that Bowlin said "I'm going to kill them all" while he was inside the residence arguing with the woman. The officers assert that this was a threat directed at all the officers present. The woman inside the residence with Bowlin at the time the statement was made testified that Bowlin stated he would shoot them all, meaning all his bullets, when she was objecting to the discharge of the rifle. The witness denied the claim that Bowlin had threatened the officers. The officers also testified that Bowlin fired his rifle into a tree near them. Bowlin testified that he was not aware that the officers were present, and meant no threat to them. He asserted that he was merely taking target practice on his own property, and did not hear the officers approach. It is uncontroverted that the officers were hidden in the woods when the shot was fired, and were not immediately visible to Bowlin.

After a jury trial, Bowlin was convicted of three counts of terroristic threatening. These counts related to the alleged threats made against the woman inside the residence, and

the alleged threat made to "kill them all" with regard to two of the officers on the scene. Bowlin was convicted of two counts of wanton endangerment, relating to the officers hidden under the tree he shot into during the incident. Bowlin was also convicted of possession of drugs and paraphernalia, and one count of first degree cruelty to animals. He was sentenced to a total of ten years imprisonment. Bowlin appeals his conviction and the sentence rendered thereon.

Bowlin claims that the trial court erred when it did not give an instruction on terroristic threatening as a lesser included offense of wanton endangerment with regard to officers Marcum and Saunier. Over defense objection, the trial court gave the instructions as two separate charges, rather than giving terroristic threatening as a lesser included offense to the wanton endangerment charge. Bowlin argued before the court that the charges should be considered lesser included offenses. Terroristic threatening is considered a lesser included offense of wanton endangerment. See: Watson v. Commonwealth, Ky., 579 S.W.2d 103, 104 (1979).

The trial court denied the motion, stating that the request was unsupported by the evidence. Bowlin contends that the evidence supported giving the instructions together, rather than separately. He contends that the evidence required such an instruction. Swain v. Commonwealth, Ky., 887 S.W.2d 346, 348

(1993) requires the trial court to give all instructions supported by the evidence. Bowlin claims that based on the evidence before it, the jury could have convicted him of just one of the offenses, and presenting the related charges as separate and distinct offenses prejudiced his case.

The Commonwealth argues that the wanton endangerment charges were separate and distinct from the terroristic threatening charges. The wanton endangerment charges stem from assertions that Bowlin discharged his rifle towards two police officers attempting to question him. According to the officers, the terroristic threatening charges occurred separately, though closely related in time and place. The Commonwealth claims that at no point prior to the firing of the shot did Bowlin make threats against the officers. The officers contend that Bowlin made the threats once he returned to the trailer after firing the shots. The Commonwealth claims that the threats were different from the action of shooting, and constitute a separate offense. The law holds that a defendant cannot be convicted of both terroristic threatening and wanton endangerment when the charges concern the same victim and a related course of conduct. Commonwealth v. Black, Ky., 907 S.W.2d 762, 763 (1995). The instructions given were improper.

Bowlin asserts that he was unduly prejudiced when the Commonwealth introduced a domestic violence order against Bowlin

to impeach the testimony of the woman in the trailer when she denied being afraid of Bowlin. Bowlin asserts that introduction of the prior bad acts was improper, and constituted palpable error. The Commonwealth argues that there is no evidence tending to show that the outcome of the trial would have been different if the evidence had been excluded, as required by Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996) where there is a finding of palpable error. The Commonwealth also asserts that the introduction of the DVO was proper impeachment evidence, as the witness had denied that she was afraid of Bowlin. Counsel cites no case law supporting this position.

A domestic violence order is a document which may very well give rise to prejudice in the minds of the jurors. While the document may have been introduced simply to impeach the witness, the very real effect of the document was to cast Bowlin as a dangerous man. Admission of impeachment evidence which relates to a material fact, in this case the threat posed by Bowlin, is in error. Caulder v. Commonwealth, Ky., 339 S.W.2d 644, 645 (1960). Where prior contradictory statements of a witness are sought to be admitted, the trial court must admonish the jury that such statements are to be used only for the purpose of impeaching the witness. Commonwealth v. Strunk, Ky., 293 S.W.2d 629, 630 (1956). No such admonishment was provided in this case. The burden is on the Commonwealth to show the

need for the introduction of such potentially prejudicial evidence. Drumm v. Commonwealth, Ky., 783 S.W.2d 380, 381 (1990). No attempt was made to meet this burden.

KRE 404(b) permits introduction of evidence of prior bad acts under only very limited circumstances. None of the exceptions found in the rule are present in this case. In admitting such evidence, the trial court must weigh its prejudicial effect against its probative value. Cotton v. Commonwealth, Ky., 454 S.W.2d 698, 701 (1970). On the record before us we must conclude that the prejudice created by introduction of the document outweighed its probative value, and reverse the conviction. Daniel v. Commonwealth, Ky., 905 S.W.2d 76, 79 (1995).

ALL CONCUR.

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