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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000721-MR

FREDERICK ALEXANDER MARTIN — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 02-CR-00127

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

BARBER, JUDGE: In this appeal Appellant, Frederick Alexander Martin (Martin), challenges his conviction and sentence for one count of kidnapping, two counts of misdemeanor assault, and one count of terroristic threatening on the grounds that the admission of videotape proceedings from a prior domestic violence proceeding were improperly admitted and certain comments made by the prosecutor in closing argument were improper. Each ground urged for reversal is founded upon palpable error because no objections were made to the evidence

at trial. We believe that Martin's conviction and sentence must be reversed for the reasons that follow.

RCr 10.26 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.

See also KRE 103(e). Manifest injustice, while not being susceptible to exact definition, applies where an appellate court can say that a miscarriage of justice has resulted. Commonwealth v. M.G., Ky. App., 75 S.W.3d 714, 719 (2002). It has been said that manifest injustice requires a reviewing court to conclude that there is a substantial possibility that the outcome of the trial would have been different. Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997); Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996); Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983); Schaefer v. Commonwealth, Ky., 622 S.W.2d 218, 219 (1981).

Martin's conviction in this case arose out of a series of events that began on February 18, 2002. According to the testimony of Dawn Kirby (Kirby) she and Martin had dated but recently broken up. She and Martin were at a friend's residence drinking. Kirby evidently left the residence and returned

several times. On the last occasion of her return Martin took the keys to her vehicle and Kirby followed him outside. The two began arguing with Kirby sitting in the passenger seat and Martin in the driver's seat. Kirby was urging Martin to leave while seated partially in the car. Martin put the car in gear and began to drive away – in response Kirby pulled her leg into the car and shut the door.

The two drove to a Sonic restaurant where Kirby testified that Martin hit her. They then returned to the residence they began from (Tara Luten's) where Kirby stated that Martin continued to hit her, pushed her out of the car, and then got out and pushed her back into the vehicle. Martin then attempted to re-enter the driver's seat, but Kirby had locked the doors. Martin then continually jumped on the hood of the car until being removed by Tara Luten's brother. Sometime during this Tara Luten got into the car with Kirby. The two proceeded to the emergency room of a nearby hospital, filed a police report, and then returned to Tara Luten's residence.

Sometime later Kirby, Tara Luten, and Keisha Halliburton decided to leave the residence and drive around and visit another friend. During their journey they came upon some of Martin's sisters and Tara Luten and Keisha Halliburton got out of the car to confront them with the events of the day.

Kirby remained in the vehicle. At that time Martin, who had been hiding under clothes in the backseat, jumped out and got into the driver’s seat of the car. He then drove off with Kirby, eventually stopping at a flood wall. Kirby testified that Martin repeatedly struck her on the way to the flood wall and after they reached the destination even striking her on the back of her legs with the antenna from the car. She also stated that Martin threatened to kill her and throw her body in the river.

After some time Martin and Kirby got back into the car and made a stop to buy some cigarettes. Shortly afterwards the two were stopped by the police. When the officer approached the car Martin jumped out and ran away. Kirby got into the driver’s seat of the car. The police officer chased Martin around a building but was unable to catch him and he returned to the car and told Kirby to drive to a motel.

Kirby testified that she and Martin then went to a hotel where they obtained a room for the evening. She and Martin spent the night there and the next morning Martin wanted to be taken to his mother’s home. He got into the car under the clothes he had hid under the previous day and Kirby drove. Another police officer stopped the vehicle, but Kirby told him that she did not know where Martin was currently. After the

stop Kirby took Martin to his mother’s house, then returned to Tara Luten’s where she met her mother, and went to the police.

Other testimony in the trial contradicted that of Kirby’s that Martin returned to the car after being stopped by the police the first time. Amanda Hobbs and Debbie Henry testified that Martin came to the residence of Amanda Hobbs asking for a ride to a motel and they took him there. At the hotel a young woman came out to meet him and she did not appear to be afraid.

There was also proof that when Kirby went to the police the second time, after spending the night with Martin, that she “forgot” to tell the police about staying with Martin the previous evening and so returned to make another statement.

At Martin’s trial before any of this testimony was elicited, the prosecutor had the videotaped domestic violence proceeding held in the district court admitted into evidence. No objection to the tape was made.

On the tape Martin appears in jail clothing along with the District Judge, a bailiff, the county attorney, and Kirby. At the hearing the District Judge swears in both Kirby and Martin and then reads the allegations in the petition for the protective order. Those allegations are a summary of the testimony given by Kirby at the subsequent criminal trial. After stating a synopsis of the events the court inquires of

Kirby if those allegations are true to which she responds "Yes." The court then asks Martin if he wishes to reply to the allegations.

Martin then denies kidnapping Kirby, but admits that he was trying to leave in her car although he knew she would be angry. Martin also admits threatening Kirby, but not until after she threatened him. He then goes on to admit hiding in her car, grabbing Kirby, and driving off. Martin further states that he and Kirby were fighting. At this point the court advises Martin that he may want to stop talking since he has criminal charges pending. After this Martin admits that there was violence between him and Kirby. The hearing concludes with the court finding that there is sufficient evidence to warrant the issuance of a domestic violence order and imposing other conditions on Martin such as counseling.

On appeal Martin makes several arguments that the videotape of the domestic violence proceeding should not have been admitted into evidence. First is the fact that he appears in obvious jail clothing on the tape. Secondly, he was not advised of his right to counsel. Third, he was not advised of his right to remain silent. Fourth, the district court's summary of Kirby's allegations impermissibly bolstered her testimony. Fifth, the court's findings had the effect of casting official suspicion on Martin. And, finally, that the

admission of the videotape violated the prohibition in KRS 403.780 against the admission of such evidence in a subsequent criminal trial. For all of these reasons Martin maintains that the videotape should not have been admitted, and the failure to exclude it constitutes palpable error.

The first contention that Martin's appearance in jail clothing is error is based on RCr 8.28(5). That provision of the Rules states that a defendant shall not be required to wear the distinctive clothing of a prisoner when appearing before the jury.

The United States Supreme Court recognized the prejudice to a defendant required to appear before the jury in jail clothing in 1976. In Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), the Court held that it is reversible error to require a defendant to appear before the jury in jail clothing if objected to by the defense. Id. 425 U.S. at 512-513, 96 S.Ct. at 1697. Kentucky has likewise acknowledged that when objection is made and overruled, the defendant's appearance in jail clothing before the jury is reversible error. Scrivener v. Commonwealth, Ky., 539 S.W.2d 291, 292 (1976).

However, these cases make clear that an objection must be made in order to preserve the error. In Martin's case no objection was made, therefore, his appearance before the jury in

prison clothing by way of the videotape is not, by itself, a palpable error requiring reversal.

Martin's contention that palpable error was committed by denying him the right to counsel at the domestic violence hearing also must fail. The right to counsel is guaranteed by the Fifth Amendment to the United States Constitution and § 11 of the Kentucky Constitution. Those two provisions assure a defendant the right to counsel in all criminal proceedings. The right to counsel is a matter of procedural due process and not substantive criminal law. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 455 (2001).

The United States Supreme Court has recently considered the issue of when the right to counsel attaches, and held that the right to counsel attaches to charged offenses. Texas v. Cobb, 532 U.S. 162, 172-173, 121 S.Ct. 1335, 1343, 149 L.Ed.2d 321 (2001).

A domestic violence hearing under KRS 403.745 does not involve a "charged offense" within this meaning. A domestic violence proceeding is civil in nature because the possible consequences do not involve the deprivation of the respondent's liberty. It is only if an order is issued and violated that the possibility of criminal sanctions comes into play under KRS 403.763. Thus, we hold that a respondent in a domestic violence hearing is not entitled to counsel under the Fifth Amendment to

the United States Constitution or § 11 of the Kentucky Constitution. Accordingly, the failure to have counsel at Martin's domestic violence hearing cannot provide grounds for reversal.

We shall deal with the remainder of Martin's arguments before addressing the issue of whether he should have been advised of the right to remain silent in the domestic violence hearing since the consideration of it is lengthier.

Error is alleged in that the district court judge's summary of Kirby's allegations against Martin at the domestic violence hearing impermissibly bolstered Kirby's testimony at trial. We agree with this contention. The videotape was the first piece of evidence introduced at the trial, and the first matter discussed by the district court on the tape was Kirby's allegations that Martin had kidnapped her, assaulted her, and threatened her.

KRE 801A(a)(2) allows the admission of a prior consistent statement even though the declarant is available to testify if a proper foundation is laid pursuant to KRE 613 and:

> [T]he statement is:
>
> (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;. . . .

The testimony of Kirby, summarized by the district court on the videotape, was clearly not offered in accordance with the rule and served only to bolster Kirby's testimony at the trial.

In an analogous case the Kentucky Supreme Court reversed a murder conviction in part because the audio portion of a videotaped "reenactment" of the crime played four times during the defendant's trial constituted prior consistent statements of one of the investigating officers and was not offered in accordance with the Rules of Criminal Procedure or for any other proper purpose. Fields v. Commonwealth, Ky., 12 S.W.3d 275, 280 (2000).

Not only was Kirby's testimony at trial bolstered by the admission of the videotape, but the conclusion of the court – that acts of domestic violence had been committed based on the same facts as those alleged by the Commonwealth at Martin's criminal trial – in effect cast official suspicion on Martin that he had committed the very crimes he had been charged with by the Commonwealth. The United States Supreme Court has held that a defendant:

> Is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468 (1978). While this holding was made in the context of the failure to give an instruction on the presumption of innocence, we believe that the statement made by the Court applies with equal force to the situation presented in this case. The district court's judgment was not presented as proof of guilt at Martin's trial, yet the jury was allowed to hear the court's conclusions without any admonition to reach its own decision about Martin's guilt or innocence without reference to any other authority's determination.

Having said that the bolstering of Kirby's testimony and the official suspicion cast by the district court are error, we do not believe that either, standing alone, would constitute palpable error. Were these errors the only ones committed at the trial, we cannot say that there would be a substantial possibility that the outcome would be different.

Martin also urges that comments made by the prosecutor in closing argument were improper and amount to palpable error. Specifically, the prosecutor implored the jury, "You are representatives of the community. You must send a signal today that this kind of behavior will not be tolerated in McCracken County."

When considering remarks made by a prosecutor in closing argument this Court must determine whether it was so

egregious as to deny Martin due process of law. Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1988). Considering the wide latitude allowed to counsel in closing arguments, we do not believe that the remarks Martin complains of cross any lines delineated by law. See Slaughter, 744 S.W.2d at 412; Jackson v. Commonwealth, 301 Ky. 562, 566, 192 S.W.2d 480, 482 (1946).

Martin argues that the failure to advise him of his right to remain silent at the domestic violence hearing is palpable error. We agree.

The right to remain silent is founded upon the 5th Amendment to the United States Constitution and § 11 of the Kentucky Constitution. Those provisions prohibit a defendant from being compelled to give evidence against himself although the Kentucky Constitution is considered to be possibly broader than the federal constitution on this subject. See Shull v. Commonwealth, 475 S.W.2d 469, 472 (1971).

The origin of the right against self-incrimination did not begin with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), although it is probably the most recognized citation. An examination of the case law, however, demonstrates that the right, embodied in the Fifth Amendment to the United States Constitution and § 11 of the Kentucky Constitution, has been considered frequently prior to that landmark decision.

To begin with, the right to remain silent applies not only to criminal proceedings, but in civil proceedings and where one is merely a witness. Akers v. Fuller, 312 Ky. 502, 504, 228 S.W.2d 29, 31 (1950); Kindt v. Murphy, 312 Ky. 395, 401, 227 S.W.2d 895, 898 (1950). While not every witness is entitled to be advised of his or her right against self-incrimination, the weight of authority holds that the testimony of a person at a prior proceeding where he or she appears as a witness, but has not been accused or placed under suspicion, is admissible against him or her in a subsequent criminal prosecution. This is based on the determination that the individual's testimony was voluntarily given. However:

> Where a person is called as a party in another proceeding, that is, as one accused or under suspicion, and the object of the hearing, his or her testimony may not be used against him or her in any manner, unless he or she has specifically waived his or her privilege against self-incrimination.

21A Am.Jur.2d Criminal Law § 1154 (Emphasis added.)

Kentucky law is in agreement with this authority. In an unbroken line of cases stretching back to at least 1873, Kentucky has held to the principle that a defendant's former testimony is admissible against him in his subsequent criminal trial only if voluntarily given. See, e.g., Canler v. Commonwealth, Ky., 870 S.W.2d 219, 221 (1994) ("involuntary statement cannot be used at trial under any circumstances.")

In Pruett v. Commonwealth, 199 Ky. 35, 250 S.W. 131 (1923), the Court considered the question of whether the statements of one who was under suspicion of a crime and who testified at a coroner's inquest could be admitted at a subsequent trial. After examining the law in this jurisdiction as well as others the Court held:

> The facts, circumstances, and state of public feeling might be directed against a suspected person to such an extent as to render the coroner's inquest practically equivalent to an examining trial of the suspect. Under such conditions, if sworn without being cautioned, it could hardly be said that his testimony would be voluntary.

Id. 250 S.W. at 134. The Court went on to hold that one suspected of a crime, but not charged, has the burden of showing that his former testimony was involuntary. Id.

From the Court's discussion in Pruett and other case law in Kentucky, it is clear that the rule has always been that in order for testimony given by an individual to be admissible against him in a subsequent proceeding it must be voluntary. In addition, if the individual has been charged with a crime, and in some circumstances is suspected of a crime, and testifies, his statements at the former proceeding are not considered voluntary unless he is advised of his right against self-incrimination. See Brown v. Commonwealth, Ky., 275 S.W.2d 928, 932 (1955) (where defendant not under arrest and testifies at

coroner's inquest, his statements are voluntary and admissible at subsequent criminal trial); Sams v. Commonwealth, 294 Ky. 393, 171 S.W.2d 989, 992 (1943) (defendant's statements at court of inquiry after being advised of right not to incriminate herself were admissible at subsequent criminal trial); Addington v. Commonwealth, 200 Ky. 290, 254 S.W. 889, 889-890 (1923)(plea of guilty in federal court admissible in subsequent state criminal proceeding); Bess v. Commonwealth, 26 Ky.L.Rptr. 839, 118 Ky. 858, 82 S.W. 576, 578 (1904) (testimony of defendant made at first trial is admissible at second trial even where accused elects not to testify); Seaborn v. Commonwealth, 25 Ky.L.Rptr. 2203, 80 S.W. 223, 223 (1904) (voluntary statements made by accused at his examining trial held admissible in subsequent criminal trial); Smith v. Commonwealth, 16 Ky.L.Rptr. 169, 26 S.W. 1100, 1101 (1894) (defendant's testimony in two prior proceedings admissible at his criminal trial); Sanderson v. Commonwealth, 11 Ky.L.Rptr. 341, 12 S.W. 136, 137 (1889) (defendant's statements before grand jury are admissible in criminal trial); Commonwealth v. Benge, 7 Ky. Op. 408 (1873) (defendant's statements before county judge admissible at criminal trial).

Thus, it is seen that the majority of cases have found that the former testimony of a defendant is admissible at his or her subsequent criminal trial. However, all have applied the

rule found in Tines v. Commonwealth, 25 Ky.L.Rptr. 1233, 77 S.W. 363, 364 (1903), where the Court held:

> '[T]he testimony of an accused party, taken as such, is not admissible when such accused party is put on his oath and sworn and examined. This rule is founded upon the unreliable as well as the inquisitorial character of such statements; and therefore, when a man, having been arrested by a constable, without warrant, upon suspicion of having committed murder, was examined as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder. The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate.' We think the affidavit introduced in this case clearly comes within the rule of law above stated, and, as it constituted the sole link in any way connecting appellant, Tines, with the commission of the crime, the court should have peremptorily instructed the jury to find him not guilty.

Id. quoting Wharton, Criminal Evidence, § 668.

As we have said, the common thread in all of the cases cited is whether the former testimony of the defendant can be said to be voluntary at the time it was made.

The rule in this jurisdiction is that where a person stands accused of a crime and is sworn to testify in a proceeding other than his or her criminal trial, the testimony is not voluntary unless he or she is warned that the testimony may be used against him or her at a later time and then chooses to testify anyway. The weight of authority from other jurisdictions also agrees with this view. See 5 A.L.R.2d 1404,

Use in Subsequent Prosecution of Self-Incriminating Testimony Given Without Invoking Privilege.

Turning to Martin's case in particular, his testimony given in the domestic violence hearing was made under oath. He was not warned in any way that he had a right not to incriminate himself. Only after he made damning statements against his interest did the district judge attempt to stop him from saying anything further. Even the court's advice did not clearly convey to Martin that he had a right not to incriminate himself, it only cautioned that he may not want to say anything else since he had criminal charges pending.

All of the statements made by Martin at the domestic violence hearing were admitted into evidence at his criminal trial. This was clearly an error and one of constitutional proportions. Moreover, we believe it to be palpable error because it was the only evidence against Martin that came from him since he elected not to testify. His election not to testify was an assertion of his right to remain silent and not be compelled to give evidence against himself. The admission of his sworn testimony from the domestic violence hearing, given without being advised of his right against self-incrimination, trampled this right. The outcome of the trial might well have been different if the jury had not heard Martin's own admissions. The jury imposed the minimum sentence for

kidnapping and less than the maximum for the other charges. The Commonwealth's evidence against him was not overwhelming and we conclude that there is a substantial possibility that the outcome of the trial would have been different without the admission of the former testimony. We are also mindful that the other errors noted above, while not rising to the level of palpable error individually, added to the error of admitting Martin's former testimony, and only serve to reinforce our view that had the errors not been committed, there is a substantial possibility that the outcome of the trial may have been different.

Finally, Martin has argued that the admission of his testimony from the domestic violence hearing runs afoul of KRS 403.780. That statute prohibits the introduction of testimony offered by an adverse party in a domestic violence proceeding in a subsequent criminal trial involving the same parties.

The Commonwealth has responded that KRS 403.780, while it acts to exclude Martin's former testimony, is in conflict with KRE 801A(b)(1) which allows the admission of statements of a party. The reasoning goes that the statute is an attempt to unilaterally amend the Rules of Evidence and the Legislature is prohibited from so acting by §§ 27, 28, and 116 of the Kentucky Constitution and KRE 1102(b). Those sections provide for the separation of powers between branches of government and give to

the Kentucky Supreme Court the sole authority to promulgate rules of practice and procedure under the Kentucky Rules of Evidence. The Supreme Court has held KRS 532.055(2)(a)6, which allowed admission of juvenile court records in certain circumstances, unconstitutional as violative of the above principle. Manns v. Commonwealth, Ky., 80 S.W.3d 439, 446 (2002). And this is the authority the Commonwealth relies on in the present case.

We do not believe, however, that KRS 403.780 conflicts with KRE 801A(b)(1) in this case. KRS 403.780 merely recognizes the principles of constitutional law we have discussed above; namely that the accused has a right not to incriminate himself and to be advised of that right before giving sworn testimony. KRS 403.780 seeks only to protect that right in the circumstances before us in Martin's case.

We decline to consider whether KRS 403.780 would violate constitutional principles on other facts since our decision is not founded on its application, but on the application of constitutional principles that are embodied in the Fifth Amendment to the United States Constitution and § 11 of the Kentucky Constitution which surely supersede any statutory directives.

For the above stated reasons Martin's conviction and sentence is reversed and the case is remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Michael C. Lemke Louisville, Kentucky	Gregory D. Stumbo Attorney General of Kentucky
	Brian T. Judy Assistant Attorney General Frankfort, Kentucky