

RENDERED: JUNE 2, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000514-MR

JOHNNY SALYERS, JR.

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 03-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MINTON AND VANMETER, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

VANMETER, JUDGE: Under Kentucky Rules of Evidence (KRE) 804, a statement against interest is not excluded by the hearsay rule if the declarant is unavailable as a witness. In this case, the primary issue we must decide is whether Herman Lee Vires' statement to a corrections officer, that he planned not to testify in a legal proceeding even prior to receiving an alleged threatening statement fell within the parameters of KRE 804 as

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<sup>1</sup> 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.

an exception to the hearsay rule. Because we hold that it did not, we affirm the judgment of the Breathitt Circuit Court.

Vires, who was serving a fifty-year sentence for first-degree rape, was attending the Breathitt Circuit Court motion day on January 24, 2003, as a witness in a murder case against appellant, Johnny Salyers, Jr., and Charles Fraley. Before Vires took the stand in the Fraley matter, Salyers passed in front of Vires and Corrections Officer Charles Brown overheard Salyers say, "If you take the stand, you are a dead man." Later that day, when called to the stand to testify, Vires refused to take the oath or to answer any questions. The trial judge held Vires in contempt for his refusal to testify and imposed a six-month sentence to be served consecutive to his fifty-year sentence.

Following the hearing, Brown reported Salyers' statement to the prosecutor. As a result, Salyers was indicted for intimidating a participant in the legal process, a Class D felony.<sup>2</sup> In addition, Salyers was charged with first-degree persistent felony offender (PFO).<sup>3</sup> After a jury convicted Salyers of the intimidation charge, he accepted the Commonwealth's offer with regard to sentencing, entered a guilty

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<sup>2</sup> KRS 524.040.

<sup>3</sup> KRS 532.080.

plea to the PFO charge, and received a sentence of ten years. This appeal followed.

Salyers raises two issues. First, he argues the trial court erred in prohibiting Brown from testifying that Vires stated that even prior to any comment by Salyers, he had no intention of testifying. Salyers argues that this testimony was admissible under KRE 804 as an exception to the hearsay rule because it was a statement against interest. Second, Salyers argues that the trial court erred in failing to direct a verdict of acquittal.

With respect to Salyers' argument that the trial court erred in refusing to permit Brown to testify as to Vires' stated intention of not testifying at the January 2003 hearing, we note initially that Salyers' trial counsel in fact elicited this testimony from the witness who was the Commonwealth's primary investigator of the intimidation charge. Thus, Vires' intention not to testify was otherwise made known to the jury and was argued to them in Salyers' closing argument. Brown's testimony as to Vires' statement would have been merely cumulative.

Moreover, we note that the elements of intimidation focus on the accused's actions and state of mind, rather than those of the witness.<sup>4</sup> The witness's state of mind, insofar as

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<sup>4</sup> While intimidation may occur in a number of ways under KRS 524.040, the jury instructions required the jury to find that Salyers had directed a threat to Vires, that Salyers believed Vires would or might be called as a witness in a

he intended not to testify, is irrelevant except to the extent that the accused may have been aware of that state of mind. So, the testimony that Salyers attempted to elicit from Brown was irrelevant to the proceeding.

Further, under KRE 804(b)(3), a statement is not excluded by the hearsay rule if "at the time of its making . . . [it] so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Salyers' argument is that Vires' statement, that he was not going to testify, was against his penal interest because it subjected him to being held in contempt. However, Salyers makes no showing that Vires was aware at the time he made the statement that his refusal to testify would result in penal sanctions.<sup>5</sup> As Vires is a fifty-one-year-old man serving a fifty-year sentence for first degree rape, with an anticipated release date in 2042, we believe the penal consequences are somewhat remote, even assuming Vires was aware of those consequences. Thus, the trial court did not err in refusing to permit Brown's testimony

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pending case, and that Salyers' intent was to influence or to attempt to influence Vires.

<sup>5</sup> See *Slaven v. Commonwealth*, 962 S.W.2d 845, 854 (Ky. 1997) (court holding that "[i]n order for this exception to apply, the affected pecuniary or proprietary interest must not be too indirect or remote," and that the party seeking to use the exception bears the burden of establishing that the declarant knew the statement, when made, was against his interest).

regarding Vires' alleged statement that he did not intend to testify at the January 2003 hearing.

Salyers' second argument is that the trial court erred in failing to direct a verdict of acquittal in his favor.<sup>6</sup> The standards regarding a motion for a directed verdict of acquittal are well-settled, as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.<sup>7</sup>

In this case, Brown testified as to the threat made by Salyers, and Vires thereafter refused to testify in any proceeding involving Salyers. While Salyers presented a

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<sup>6</sup> The parties agree that Salyers failed to renew his motion for a directed verdict at the close of all the evidence, thereby failing to preserve this issue for appellate review. *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977). However, since Salyers requests we consider this issue as a palpable error, our review proceeds under the standards for a motion for directed verdict. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836-37 (Ky. 2003).

<sup>7</sup> *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

conflicting story and explanation for the jury,<sup>8</sup> the jury was clearly entitled to consider the evidence and to choose which version it found more credible.<sup>9</sup> Our opinion is that under the evidence as a whole, it was not unreasonable for the jury to find Salyers guilty.

The judgment of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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<sup>8</sup> Salyers claimed he merely said to Vires, "Do your own fucking time." In addition, Salyers presented evidence that Brown was behind Salyers when Salyers made his statement to Vires, thereby raising a question as to Brown's ability to hear the statement. In addition to his own testimony, Salyers presented two witnesses. One, another jail prisoner, testified she did not see or hear anything transpire between Salyers and Vires. The other, a deputy jailer, corroborated Salyers' version of the statement.

<sup>9</sup> *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995); *Stafford v. Commonwealth*, 490 S.W.2d 738, 740 (Ky. 1973) (court stating that "[w]here evidence is conflicting or different inferences may be drawn from it, the question of its weight and probative effect is one that is in the province of the jury[,] and holding that the trial court had properly denied a motion for directed verdict).