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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000910-MR

CARLOS CREECH

APPELLANT

V. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
CIVIL ACTION NO. 99-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

MINTON, JUDGE: Carlos Creech was sentenced to ten years' imprisonment after a jury found him guilty of second-degree manslaughter for the shooting death of Selva Ray Thomas. Creech now appeals the judgment of conviction and sentence claiming that the trial court erred when it failed to suppress his

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

confession, improperly instructed the jury on the elements of second-degree manslaughter and reckless homicide, and that a panel of this court erred in an interlocutory appeal when it reversed the trial court's grant of a new trial. We find no merit to any of Creech's arguments. So we affirm the judgment.

I. FACTUAL SUMMARY.

For several years, Creech was romantically involved with a woman named Ida Sutton. But in August 1999, they ended their relationship. And although they were no longer dating, Creech continued to call Sutton.

After breaking off the relationship with Creech, Sutton became friendly with Selva Ray Thomas. The two were not dating as Thomas was a married man. But it is undisputed that Sutton and Thomas spent time together.

In the early morning hours of October 31, 1999, Thomas's corpse was discovered on the side of a road in Jackson County. Hours before, Thomas, Sutton, and several others had been four-wheeling in Jackson County. Their outing ended around 10:00 p.m., and Thomas and Sutton returned to Sutton's trailer.

Shortly after their return, Creech phoned Sutton asking her if she had been out four-wheeling. He also asked if she were alone, to which she responded in the affirmative. About two hours later, Sutton and Thomas saw a flash of light

behind the trailer. When Thomas went to investigate, he found that the cooler attached to his four-wheeler had been set afire. Thomas doused the fire, jumped on the four-wheeler, and headed toward the main road.

Sutton testified that as Thomas departed on his four-wheeler, she heard a truck start up at the top of the hill behind her trailer. Sutton then heard two gunshots. She then heard the truck and the four-wheeler leave the scene. Sutton went to the road to investigate. She was met by Russell Justice, who informed her that Thomas had flipped his four-wheeler and was dead. Even though Thomas's four-wheeler had flipped, he actually died from gunshot wounds.

Because of the relationship between Creech and Sutton, the relationship between Sutton and Thomas, and Creech's phone call to Sutton just before Thomas's death, Creech became a suspect. So the sheriff and one of his deputies went to Creech's home to discuss the situation with him. Creech initially denied any knowledge of Thomas's death. According to him, he had driven his truck to a field sometime late in the evening to listen to his foxhounds run on a neighboring farm. As he was on his way home, he met Thomas astride his four-wheeler. He tried to drive past Thomas, but Thomas blocked him from passing on the road. Creech stated that Thomas then got off the four-wheeler and approached his truck. Acting upon the

belief that Thomas was a "violent and dangerous man" and that he may have been armed, Creech fired a pistol "in Thomas's direction 2 or 3 times." Thomas then turned slightly and walked past Creech's truck, at which time Creech pulled around the four-wheeler, drove home, and went to bed.

The sheriff and his deputy arrived at Creech's home at approximately 2:30 a.m. Although the sheriff only stayed for a short while, the deputy remained with Creech. At around 5:00 a.m., Kentucky State Police Detective Joie Peters arrived. Detective Peters questioned Creech about Thomas's death, but Creech denied any knowledge. Eventually Creech's son, daughter, and son-in-law arrived. Creech went outside to confer with his son. Upon his return, he apparently informed the Detective that he was ready to make a statement and was read his *Miranda*² rights. He then confessed to shooting Thomas, and he showed Peters where the gun was hidden. Creech was not arrested at that time.

II. PROCEDURAL HISTORY.

The Jackson County grand jury later indicted Creech on one count of murder, one count of criminal attempt to commit arson, and one count of first-degree criminal mischief. The murder charge arose from the shooting death of Thomas; the arson

² Miranda v. Arizona, 396 U.S. 868, 90 S.Ct. 140, 24 L.Ed.2d 122 (1969).

charge arose from the grand jury's belief that sufficient evidence existed to charge that Creech "intentionally set fire to an ATV located next to [Sutton's] mobile home in an attempt to burn the mobile home"; and the criminal mischief charge arose from the fire damage to Thomas's ATV.

At trial, an issue arose during jury deliberation that the members of the petit jury had improperly separated before reaching a verdict and may have been influenced in their deliberation by contact with non-jurors in the courthouse hallway. It appears that the jury room at the courthouse is not equipped with a restroom. So during deliberation in this case the male and female jurors were allowed to separate to use the restroom in another part of the courthouse. Creech claimed this amounted to jury separation in violation of RCr³ 9.66 and moved for a mistrial. The trial court denied the mistrial motion. The jury found Thomas guilty of second-degree manslaughter. He was sentenced to ten-years' imprisonment. Creech filed a post-judgment motion for a new trial citing the alleged improper jury separation. The trial court granted this motion, and the Commonwealth filed an interlocutory appeal.

³ Kentucky Rules of Criminal Procedure.

In an unpublished decision, a panel of this Court reversed the trial court's decision.⁴ The panel held that the facts from the hearing on the new trial motion did not reveal sufficient evidence to indicate that the jury was subjected to improper influence. The panel also noted that there was insufficient proof to establish that an impermissible separation of the jury occurred. Holding that the trial court abused its discretion in granting Creech a new trial, the panel reversed the trial court's decision and set aside its new trial order. The trial court was directed to "reinstate the jury's verdict and sentence."

The Kentucky Supreme Court denied Creech's request for discretionary review. And the trial court entered a final judgment and sentence from which this appeal is taken.

III. ARGUMENTS ON APPEAL.

Creech makes three main arguments: first, the trial court erroneously admitted Creech's confession into evidence at trial; second, the trial court's jury instructions were erroneous; and, third, this Court erred in reversing the trial court's decision to grant Creech's motion for a new trial.

⁴ Commonwealth v. Creech, 2002-CA-001434-MR, Mar. 7, 2003.

A. Creech's Confession.

Creech first argues that the court's order denying his motion to suppress was inadequate in that it failed to make the factual findings required by RCr 9.78. He asserts that "[a]lthough the Order refers to certain findings of fact which were made on the record at the conclusion of the hearing and which are incorporated by reference in the written Order, the only fact found by the trial court was that Mr. Creech was not in custody at the time he made his statement." Creech also claims the court erred in concluding his statement to Detective Peters was voluntary. We disagree.

RCr 9.78 reads:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities . . . the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

Kentucky case law affirms that a trial court's decision on a suppression motion will be upheld so long as it is supported by substantial evidence.⁵

With regard to the issue of the voluntary nature of a confession, the Kentucky Supreme Court has held that "absent a substantial factual dispute in the evidence, voluntariness of a confession may be properly decided by a reviewing court. The voluntariness of a confession is assessed based on the totality of the circumstances surrounding the making of the confession."⁶ It is the law "that a confession voluntarily made by an accused is admissible, and, even in response to a question, if the questioning is not persisted in to the extent of bringing pressure to bear on the accused to confess in order to escape being plied with questions."⁷ The General Assembly incorporated this rule into the statutory scheme when it enacted KRS 422.110, which reads:

No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or

⁵ See, Watkins v. Commonwealth, 105 S.W.3d 449 (Ky. 2003); Canler v. Commonwealth, 870 S.W.2d 219 (Ky. 1994); Morgan v. Commonwealth, 809 S.W.2d 704 (Ky. 1991).

⁶ Mills v. Commonwealth, 996 S.W.2d 473, 481 (Ky. 1999).

⁷ Cobb v. Commonwealth, 267 Ky. 176, 101 S.W.2d 418, 419 (Ky. 1936).

other wrongful means, nor shall the person having custody of the accused permit any other person to do so.

After hearing the evidence on Creech's motion to suppress, the judge made the following statement:

Alright, I'm ready to rule in this case. I find that I do not believe under the facts of this case that Mr. Creech was in custody or was in de facto custody. Mr. Creech was at home. He was not in a police station. He was not other than when he went out and made the statement in the back seat of a car. I don't even know that it was the back seat of a car at the time he made the statement. He was told he was not under arrest. He was told he would not be arrested after he makes the statement. He never made any demand that any of these people leave at any time. As a matter of fact his testimony would tend to show that he was courteous to them to the point of moving from the kitchen table into a room where they [sic] were bigger chairs. The Court [cannot] find that under these set of circumstances that Mr. Creech was in any kind of custody.

As to whether or not he was free to leave, obviously a man doesn't have to leave his home, but he was free to ask them to leave in the beginning. He was allowed to go outside to another area to talk to his son. His son has testified. It appears to me that they apparently decided and it may be that it was self defense; I don't know whether it was or not, that they were going to make a statement and rely on self defense. I don't know what the statement says. I have never read it that I remember and of course (inaudible), but I don't believe that he was in anyway involuntary in his statement. It appears to me that his statement was voluntary. Nobody put him under duress. Nobody threatened him. They

talked. The record to me doesn't even show that he was plied with questions during all of this time. He was just there with an officer talking to him, did not show what the extent of that conversation was.

The court's written order incorporated by reference the findings from the evidentiary hearing; Creech's suppression motion was denied.

We are satisfied from our review of the transcript of the suppression hearing that the trial judge made sufficient factual findings to support his ruling under RCr 9.78. These findings were incorporated into the court's order denying Creech's motion to suppress. Clearly, the decision was based on substantial evidence. We hold that the trial court complied with the fact-finding requirements of RCr 9.78.

Moreover, we agree with the circuit court's conclusion that there was insufficient evidence to suggest that Creech's statement was involuntary. As the court noted, Creech was not in custody at the time his statement was made; he was free to leave his home or to ask the officers to leave at any time; he was permitted to go outside to speak with his son; and there was no evidence of duress, coercion, or threats. Thus, the court concluded Creech's confession was voluntary. We find no error in the trial court's conclusion of law.

B. Jury Instructions.

Second, Creech claims the jury instructions on second-degree manslaughter and reckless homicide were erroneous because they failed to include "the absence of the privilege to act in self protection as an element of the offense." Citing Commonwealth v. Hager,⁸ Creech argues this error affected the jury's ultimate decision. In the alternative, Creech requests that we find his counsel ineffective.

In his brief before this Court, Creech acknowledges that this issue is not preserved for appellate review. Specifically, Creech admits that his counsel tendered the instructions he now argues were erroneous; that his counsel failed to object to his own tendered instructions; and that his failure to object was "not trial strategy but simple negligence on his part."

RCr 9.54(2) states:

No party may assign as error the giving or the 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.

⁸ 41 S.W.3d 838 (Ky. 2001).

The “[f]ailure to comply with RCr 9.54(2) has been consistently held to prohibit review of alleged error in instructions because of the failure to properly preserve the claimed error.”⁹ An error that was not preserved before the trial court may only be reviewed on appeal if the matter constitutes “[a] palpable error which affects the substantial rights of a party.”¹⁰

We fail to see how the tendered jury instructions resulted in palpable error. The instructions that were used by the court are identical to the instructions suggested by Justice Cooper in his Kentucky Instructions to Juries.¹¹ Moreover, a separate instruction regarding self-protection was included in the instructions; therefore, we do not believe the absence of a comment within the second-degree manslaughter and reckless homicide instructions regarding the privilege to act in self-protection affected Creech’s substantial rights.

⁹ Commonwealth v. Duke, 750 S.W.2d 432, 433 (Ky. 1988); *see also*, Commonwealth v. Collins, 821 S.W.2d 488 (Ky. 1991); Evans v. Commonwealth, 702 S.W.2d 424 (Ky. 1986).

¹⁰ RCr 10.26.

¹¹ WILLIAM S. COOPER, KENTUCKY INSTRUCTIONS TO JURIES, VOL. 1 CRIMINAL, §3.28, §3.29 (1999). We note that Creech argues the decision in Commonwealth v. Hager, *supra*, puts further requirements on the second-degree manslaughter and reckless homicide instructions that were not included in the 1999 version of Justice Cooper’s treatise. But the 2004 cumulative supplement makes no mention of any changes; therefore, we must assume that the 1999 version, which is the version used in Creech’s case, is correct.

Because we find no fault with the jury instructions, we also reject Creech's alternative argument. Counsel's failure to object to the instructions did not render his assistance ineffective.

C. Earlier Court of Appeals Decision.

Finally, Creech argues that the unpublished opinion of this Court reversing the trial court's grant of a new trial was erroneous. Creech suggests we "correct the error" by reinstating the trial court's order granting him a new trial.

"The 'law of the case' doctrine is firmly established in this Commonwealth. As early as 1870, we held that the Court of Appeals has no power on a second appeal to correct an error in the original judgment which either was, or might have been relied upon in the first appeal."¹² Kentucky courts have consistently held that:

The doctrine of "the law of the case" is founded upon the policy that there should be an end to litigation, and cases may not be presented by piecemeal. It is a sound policy, and well developed and understood in this jurisdiction. The doctrine, as defined by the decisions, is that one adjudication settles all errors relied upon for a reversal, whether mentioned in the opinion of the court or not, and all errors lurking in the record on the first appeal which

¹² Commonwealth v. Schaefer, 639 S.W.2d 776, 777 (Ky. 1982).

might have been, but were not expressly, relied upon as error.¹³

More recently, the Kentucky Supreme Court has noted that “where the law of the case rule is applicable, ‘it has sufficient flexibility to permit the appellate court to admit and correct an error made in the previous decision where substantial injustice might otherwise result and the former decision is clearly and palpably erroneous.’”¹⁴

It is clear that the law of the case doctrine applies to Creech’s case. Although we recognize that the doctrine provides for some flexibility, we see no reason to disturb our decision on the propriety to the jury separation during deliberation in this case. Therefore, there is no error for us to “admit and correct.”

III. DISPOSITION.

For the foregoing reasons, we affirm the judgment of conviction and sentence of the Jackson Circuit Court.

ALL CONCUR.

¹³ *Id.*, citing, Sowers v. Coleman, 223 Ky. 633, 4 S.W.2d 731 (Ky. 1928).

¹⁴ Hampton v. Commonwealth, 133 S.W.3d 438, 444-445 (Ky. 2004).

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