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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000620-MR

GERRY MOSBY — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILIP R. PATTON, JUDGE
ACTION NO. 04-CR-00270

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: Gerry Mosby (Mosby) has appealed from the judgment of the Barren Circuit Court convicting him of stalking in the first degree. Mosby argues that the trial court erred in refusing to instruct the jury on stalking in the second degree and harassment as lesser included offenses of stalking in the first degree. We affirm.

FACTUAL HISTORY

Mosby and Wanda Ritter (Ritter) were married for 18 years when, on March 3, 2004, after years of marital difficulties, Ritter filed for dissolution. Following this, Mosby no longer lived at the residence with Ritter and their children. On numerous occasions, Mosby showed up at Ritter's home uninvited and unwelcome or made telephone calls to Ritter's house. One such occasion occurred on March 4, 2004, when Mosby appeared at Wal-Mart, where Ritter worked, and confronted her. Two off-duty jail employees witnessed this exchange. Later that day, when Ritter returned from work, she discovered that someone had attempted to break into her home. Ritter called the police to report the attempted burglary, and when the police arrived, Ritter requested and obtained an Emergency Protective Order (EPO) against Mosby. This was not the first EPO Ritter had obtained against Mosby, who had been arrested on June 8, 2000, for violation of a previous EPO Ritter obtained against him.

On March 6, 2004, Ritter's vehicle caught fire while parked at a local auto mechanic's shop. One of the employees of the shop testified that the day prior to the fire, he noticed a broken window on the car and thought a rock had gone through the window. When he walked up to the car, however, he discovered a large wrench on the seat. He thought the wrench appeared to have been used to break the window. However, after the fire was extinguished, no wrench was found in the vehicle. Later that same day, the EPO was served on Mosby.

On March 9, 2004, Mosby was driving in the area of Ritter's home. Ritter reported that Mosby twice stopped across the street from her home, once getting out of his truck and watching her house. Ritter called the police, who, while responding to her house, found Mosby driving away from the general area. The police arrested Mosby at that time for stalking in the first degree. At the time of his arrest, the police found a large wrench inside Mosby's truck. The crime lab examined the doorknob from Ritter's house and, in comparing the tool marks on the knob with the wrench, concluded that some of the markings on the doorknob were consistent with the characteristics of the wrench. The Barren County Grand Jury indicted Mosby for stalking in the first degree and for being a persistent felony offender in the second degree. A jury convicted Mosby of both charges. The trial court sentenced him to an enhanced term of ten years' imprisonment in accordance with the jury's verdict. This appeal followed.

ANALYSIS

The sole issue Mosby raises on appeal is that the trial court should have given jury instructions on stalking in the second degree and harassment as lesser included offenses of stalking in the first degree. In order to decide whether these instructions are due, we must first decide whether stalking in the second degree and harassment are lesser included offenses of stalking in the first degree. If they are, we must then decide whether, under the applicable standard, the trial court was required to provide the instructions.

An offense is a lesser included offense if "it is established by proof of the same or less than all of the facts required to establish the commission of the offense

charged." KRS 505.020(2). In light of this statute, an analysis of lesser included offenses necessarily requires a comparison of the charged statute to the statute sought to be included in the instructions as a lesser included offense.

Stalking in the first degree, as applied to the facts of this case, requires intentional stalking of another person with a threat intended to place the other person in reasonable fear of serious physical injury or death by a perpetrator who was previously convicted of a felony or Class A misdemeanor against the victim or who is restrained against the victim by a protective order which has been served on the perpetrator. KRS 508.140.

A. Stalking in the Second Degree

Stalking in the second degree is a lesser included offense of stalking in the first degree because it is established by proof of less than all of the facts necessary to establish the commission of stalking in the first degree.

Stalking in the second degree, as applied to the facts of this case, requires intentional stalking of another person with a threat intended to place the other person in reasonable fear of physical injury or death. KRS 508.150 Stalking in the second degree differs in two ways from stalking in the first degree. First, stalking in the second degree requires a finding of fear of physical injury rather than a fear of serious physical injury. Second, stalking in the second degree does not require the existence of a protective order or prior conviction.

Establishing that stalking in the second degree is a lesser included offense of stalking in the first degree does not, however, end our analysis. Instructions on lesser included offenses are only appropriate if, considering the totality of the evidence, a reasonable jury might have reasonable doubt as to the defendant's guilt of the greater offense, but also believes beyond a reasonable doubt that the defendant is guilty of the lesser offense. *See, e.g. Parker v. Commonwealth,* 952 S.W.2d 209, 211 (Ky. 1997); *Caudill v. Commonwealth*, 120 S.W.3d 635, 668 (Ky. 2003). Phrased differently, "[a]n instruction on a lesser included offense is required if the evidence would permit the jury to rationally find the defendant not guilty of the primary offense, but guilty of the lesser offense." *Thomas v. Commonwealth*, 170 S.W.3d 343, 349 (Ky. 2005) (citations omitted). Alternate instructions are only appropriate where either theory is reasonably supported by the evidence. *Hayes v. Commonwealth,* 625 S.W.2d 583, 584 (Ky. 1981).

We agree with the Commonwealth's contention that Mosby's argument in this case is analogous to the argument raised by a defendant facing a PFO charge in *Payne v. Commonwealth,* 656 S.W.2d 719 (Ky. 1983). In *Payne*, the defendant was indicted for being a persistent felony offender in the first degree. This charge required a finding that the defendant had previously been convicted of two or more felonies. The defendant argued that he was entitled to an instruction on being a persistent felony offender in the second degree because the jury could have found that he had only been convicted of one felony in the past. Since the defendant did not challenge the prosecution's evidence as to the previous convictions and since there was no other

evidence presented by the defense to cast doubt that the convictions had occurred, no evidence existed from which a reasonable jury could determine that only one conviction occurred.

Payne is analogous to Mosby's case. Here, the prior conviction and EPO were presented as evidence by the Commonwealth and were not challenged by Mosby. Based on this uncontested evidence, a reasonable jury could have had no reasonable doubt as to the existence of the EPO or the prior conviction. In addition, it was within the discretion of the circuit court to make the determination that, based on the evidence presented in the case, a reasonable jury could have no reasonable doubt that Mosby was guilty of stalking in the first degree.

Based on the evidence presented, including Mosby's testimony, Ms. Ritter's testimony, and the previous EPO violation, the trial court did not err in declining to provide jury instructions on stalking in the second degree.

B. Harassment

Mosby’s claim that the trial judge erred in failing to include instructions on harassment as a lesser included offense of stalking in the first degree was not preserved for review under RCr 9.54(2). The record indicates no preservation, and, in his brief, Mosby admits that the issue was not preserved. Mosby's failure to preserve the harassment issue appears fatal, as the responsibility to object with sufficient specificity regarding instructions rests with the party wishing to challenge the instructions. *Commonwealth v. Duke*, 750 S.W.2d 432, 433 (Ky. 1988). Mosby, though, asks this

Court to review the issue pursuant to RCr 10.26, which states that "[a] palpable error which affects the substantial rights of a party may be considered 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."

The Supreme Court of Kentucky has held it to be palpable error to instruct the jury on an offense not contained in the indictment, *cf. Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83, 86 (Ky. 1991), but we are unable to find any authority holding it to be palpable error to fail to instruct on a lesser included offense of that charged in the indictment. *Clifford v. Commonwealth* ,7 S.W.3d 371 (Ky. 1999).

In addition to the preservation issue, a closer look at the elements of harassment indicates that it should not be a lesser included offense of stalking in the first degree. We hold that the crime of harassment is not established by proof of the same or less than all of the facts required to establish the commission of stalking in the first degree and is therefore not a lesser included offense of stalking in the first degree.

Harassment requires that a person make offensive remarks or use abusive language towards another in a public place or follow a person in or about a public place with the intent to harass, annoy, or alarm the other person. KRS 525.070. The elements of harassment are not the same as those of stalking in the first degree. Also, it cannot be argued that harassment is proved by less than all of the facts required to establish stalking in the first degree because harassment requires proof of the additional fact that the

behavior complained of occurred in a public place. This public place distinction makes it clear that harassment and stalking in the first degree are intended to criminalize two distinct criminal acts. As such, the trial court did not err in failing to instruct the jury on harassment as a lesser included offense of stalking in the first degree.

We note that in his reply brief, Mosby contends that Ritter's testimony was enough to support an instruction on harassment. We disagree with this interpretation of the law. The fact that Mosby would rather be charged with harassment than stalking in the first degree does not make harassment a lesser included offense of stalking in the first degree. Furthermore, we disagree with Mosby's assertion that Ritter's testimony makes harassment available as a lesser included offense. In fact, Ritter's testimony only establishes that Mosby could have been charged with harassment in addition to stalking. The grand jury, however, chose not to indict Mosby on a charge of harassment.

CONCLUSION

Having held that harassment is not a lesser included offense of stalking in the first degree and that the evidence in the case was insufficient to support an instruction on stalking in the second degree as a lesser included offense, we affirm the decision of the Barren Circuit Court.

STUMBO, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, DISSENTING: Respectfully, I dissent. I believe it was error for the trial court to fail to instruct on stalking in the second degree, as

defendant/appellant requested. Accordingly, I would reverse the conviction and remand this case to the Barren Circuit Court with directions to the court to grant Gerry Mosby a new trial and include stalking in the second degree in its instructions to the jury.

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