

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002017-MR

JEFFERY BONE

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT  
HONORABLE HUNTER B. WHITESELL, II, JUDGE  
ACTION NO. 05-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: Jeffery Bone appeals from the Fulton Circuit Court's judgment convicting him of wanton endangerment, terroristic threatening and second-degree Persistent Felony Offender (PFO 2nd). He contends the circuit court erred in denying his motion *in limine* concerning a statement he made during a bond reduction hearing. After a careful review of the record, we affirm.

### I. FACTUAL AND PROCEDURAL BACKGROUND

Bone's mother, Barbara Hopper, testified at trial that on the day in question, she was at a hospital in Paducah with her daughter, Melissa, who had just been in an automobile accident. Melissa is Bone's sister. Barbara was walking from one intensive care unit waiting room to another when she heard Bone, whose voice she recognized, yelling "hey you" from behind her. She stopped and turned around, Bone walked up to her, and asked "where the [expletive] [she] thought [she] was going to?" Barbara told him that she was going to the waiting room. She told Bone that she did not want to argue with him, but he followed her around the hospital, cursing at her. Finally, a relative convinced Bone to leave the hospital.

Later that evening, after Melissa's condition was stabilized, Barbara went home. Bone called Barbara at home several times that evening, threatening her and cursing at her. Barbara testified that during those telephone calls, Bone told her that he "had a [expletive] gun and [expletive] bullets, and was going to put one in [her] [expletive] head." She further attested that during those calls, Bone also talked about Barbara's other son, and Bone said that he had "a [expletive] bullet for all of [them]." Barbara then called the Kentucky State Police (KSP) and asked them to send an officer to her house because she was afraid that her son was going to come to her house to kill her. She also called the Fulton County Sheriff's Department and asked them to send a deputy to her house. At that time, Barbara's husband was the Fulton County Sheriff, and Barbara also worked for the Fulton County Sheriff's Department.

Two sheriffs' deputies came to Barbara's house, as well as KSP troopers. The officers told her to stay inside her house, which she did.

Brad Smith, a KSP Trooper, testified at trial. He stated he went to the Hoppers' residence on the night in question, and the situation concerning Bone's threats was explained to him by other troopers, as well as by Sheriff Hopper. While he was standing outside the Hoppers' home, he scanned the darkness and he thought he saw movement. Trooper Smith then climbed into his KSP cruiser, drove to the end of the driveway with his headlights off and, at the last second, turned on his headlights and spotlight, and saw Bone standing there. Bone then hid behind a tree. Trooper Smith exited his cruiser and took cover behind the car. Trooper Smith informed Bone that he saw him, and he directed Bone to drop the weapon he was carrying and to come out from behind the tree. Five to fifteen minutes passed before Bone came out from behind the tree with his hands up. Bone walked toward Trooper Smith, who then directed Bone to lie face down on the ground. Bone complied and Trooper Smith handcuffed him.

Another KSP trooper detained Bone while Trooper Smith went to the tree to secure the weapon. Trooper Smith found a loaded firearm containing one shell. The gun was cocked, ready to fire. Trooper David Archer attested that the firearm was twelve gauge and that he found fifteen twelve gauge, three-inch shells in Bone's pocket.

Bone was indicted on one count of Wanton Endangerment in the First Degree; one count of Terroristic Threatening; one count of Possession of a Firearm by a Convicted Felon; one count of Alcohol Intoxication in a Public Place; one count of being

a First-Degree Persistent Felony Offender; and one count of Violating a Domestic Violence Protective Order.

In response to a statement made by the prosecutor at a hearing to schedule a court date, Bone interjected, stating: "Yeah, I'm a wild man. Hell, I want to kill everybody." Bone then walked away. This exchange was recorded by the court's video camera.

Prior to trial, Bone's counsel moved *in limine*, asking that Bone's statement not be played for the jury. Counsel argued that, pursuant to KRE 403, the video tape-recorded statement should not be admitted into evidence because it was more prejudicial than probative. However, the Commonwealth asserted that the statement should be admitted because the statement was unsolicited and was relevant because Bone had threatened to kill his family members. The circuit court ruled that the tape recording was admissible.

Bone was tried before a jury. During trial, Bone's counsel again objected to the admission of the taped statement. Counsel objected to the tape's admission on the basis that it was more prejudicial than probative. This time, the Commonwealth contended that the taped statement was admissible as a statement against interest. The circuit court admitted the tape into evidence, and it was played for the jury.

Bone was subsequently convicted of First-Degree Wanton Endangerment, Terroristic Threatening, and being a Second-Degree Persistent Felony Offender. He was

sentenced to serve a total of seven years of imprisonment. On appeal, Bone contends that the admission of the tape recording violated KRE 403.

## II. ANALYSIS

Bone alleges that the admission of the statement into evidence constituted a violation of KRE 403 because the danger of undue prejudice outweighed the probative value of the evidence. We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

As previously mentioned, during a court hearing, Bone made the following statement: "Yeah, I'm a wild man. Hell, I want to kill everybody." He subsequently claimed that the statement was inadmissible pursuant to KRE 403, which provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

"The outcome of a KRE 403 balancing test is within the sound discretion of the trial judge, and that decision will only be overturned if there has been an abuse of discretion, *i.e.*, if the trial judge's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Cook v. Commonwealth*, 129 S.W.3d 351, 361-62 (Ky. 2004). In the present case, we find that the prejudicial effect the statement may

have had on the jury outweighed any probative value that the statement may have had. *See generally* KRE 403. In fact, we question whether the taped statement had any probative value at all, considering that Bone made the statement approximately two months after his arrest. Thus, we find that the circuit court abused its discretion in admitting the taped statement into evidence.

However, our review does not end there. Even if the circuit court erred in denying the motion *in limine* and in admitting this evidence at trial, the error was harmless. Kentucky Rule of Criminal Procedure 9.24 sets forth the "harmless error" doctrine and provides as follows:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

"Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial." *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000).

In the present case, Bone's mother testified at trial that Bone had threatened to kill her and other family members over the telephone. She attested that she then called the Fulton County Sheriff's Department and the Kentucky State Police, asking them to

come to her home. Trooper Smith testified at trial that he saw Bone with a gun in his hands. Bone then hid behind a tree. After directing Bone to drop his weapon and come out from behind the tree with his hands up, Bone complied. While Bone was detained by another officer, Trooper Smith secured the weapon, which he found loaded with one shell and cocked. Furthermore, Trooper David Archer testified that a search incident to arrest revealed that Bone had fifteen more rounds of ammunition in his pocket.

Based on the aforementioned trial testimony, any error in admitting into evidence Bone's taped statement is harmless because "there is [not] a substantial possibility that the result would have been any different" if the recording had not been admitted. *Gosser*, 31 S.W.3d at 903.

Moreover, Bone's reliance on *O'Neal v. McAninch*, 513 U.S. 432, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995), is misplaced. Bone cites *O'Neal* for the proposition that any error in admitting the taped statement was not harmless because the circuit judge allegedly stated that he had "grave doubt about the character," but he nevertheless admitted the tape. However, the *O'Neal* case concerned a federal habeas court's review of a state court's decision, and held that when a federal habeas court had "grave doubt" about whether a trial error was harmless, the error should not be considered harmless, but should be considered as though it had an effect on the verdict. *O'Neal*, 513 U.S. at 434-35, 115 S. Ct. at 994. *O'Neal* is inapplicable here because in the present case, although we found that circuit court erred in admitting the taped statement, we also determined

that the admission of such evidence *was* harmless error. Thus, because we do *not* doubt that the error was harmless, Bone's reliance on *O'Neal* is therefore misplaced.

Finally, because we found that any error in admitting the statement into evidence was harmless, we need not address the Commonwealth's assertion that the statement was admissible as a statement against interest.

Accordingly, the judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

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