COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000267-DG

THEODORE ANTHONY MARAS — APPELLANT

Appeal from the Court of Appeals
No. 2011-CA-002231-MR
v. Jefferson Circuit Court
Action No. 11-CR-000280

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT, THEODORE ANTHONY MARAS

Submitted by:

BRUCE P. HACKETT
Chief Appellate Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, KY 40202
(502) 574-3800
Counsel for Appellant

Certificate of Service

This is to certify that a copy of this brief was mailed, first class postage prepaid, to Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division Five, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, Hon. Wm. Robert Long, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and Hon. Samuel P. Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601, and was sent electronically by agreement to Hon. Dorislee Gilbert, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, on October 14, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of the Court.

BRUCE P. HACKETT

PURPOSE OF THE BRIEF

This brief is filed in order to clarify Mr. Maras's position in light of the Commonwealth's arguments urging this Court to apply the Federal Rules of Evidence (particularly FRE 606(b)) in the trial courts of the Kentucky Court of Justice, even though this Court and the General Assembly, in 1992, already rejected the adoption of FRE 606(b) or any rule similar to FRE 606(b). This brief is also filed to point out that the Commonwealth does not take issue with the clear evidence that the Kentucky stalking statutes, KRS 508.130-508.155, do not criminalize the "fear for the safety of a third person" form of stalking. (See Appendix D, Brief for Appellant).

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ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) AFTER IT WAS DISCOVERED THAT THE JURY CONVICTED THE APPELLANT OF STALKING UNDER A THEORY THAT IS NOT AN OFFENSE UNDER THE PENAL CODE.

The bulk of the Commonwealth's brief consists of arguments about why the trial court was obligated to ignore the post-trial explanation by jurors regarding the jury instruction question during deliberations and the ultimate explanation for the finding of guilt, which was based upon a theory that is unsupported by Kentucky law. Contrary to the Commonwealth's position, the statements made by jurors to the judge do not fall within RCr 10.04 and are not excluded from consideration by the circuit court or this Court.

Citing eleven federal court decisions that discuss FRE 606(b), the Commonwealth argues that if RCr 10.04 does not apply to the statements made by jurors to the judge, then FRE 606(b) should be applied in Kentucky state courts. Specifically, the Commonwealth says that FRE 606(b) forbids Judge Shaw and this Court from considering the jurors' explanation of the guilty verdict. (Brief for Commonwealth, pp. 4-9). The most obvious response to the Commonwealth's argument is that in our federal system of government, FRE 606(b) does not apply in the courts of the Commonwealth.

Secondly, in 1992, both the General Assembly and this Court decided against the adoption of a rule of evidence identical to or even similar to FRE 606(b). *See* KRE 1102; 1990 Ky. Acts ch. 88, § 39 ["KRS 422A.0606"], effective July 1, 1992; and 1992 Ky. Acts ch. 324, §§ 1-35, effective July 1, 1992. The federal rule addressing juror testimony contains very specific language restricting the use in federal courts of juror testimony:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Federal Rule of Evidence 606(b).[1]

But this Court and the General Assembly rejected the language of FRE 606(b) and adopted only one restriction on juror testimony. KRE 606 reads in its entirety:

> A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

The rule read exactly the same when it was originally adopted by the General Assembly in 1990. 1990 Ky. Acts ch. 88, § 39 ["KRS 422A.0606"], effective July 1, 1992. The rule has not been amended by either this Court or the General Assembly. KRE 1102. Unlike FRE 606(b), the only prohibition against juror testimony in KRE 606 is an absolute bar of a juror testifying at trial before the very jury on which the testifying juror is serving. Given the vast differences in the language and content of the two rules, KRE 606 cannot possibly have the same meaning as FRE 606(b).

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[1] In *Warger v. Shauers*, No. 13-517, the United States Supreme Court is currently considering the following issue: "Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty." *Warger v. Shauers* was argued on October 8, 2014. The Supreme Court could very well decide that the strict prohibition in FRE 606(b) against juror testimony may not be as strict as the language of the rule would lead one to believe.

The main federal case discussing and applying FRE 606(b) that the Commonwealth quotes from and relies upon, *United States v. Gonzales*, 227 F.3d 520 (6th Cir. 2000), was a case in which a juror wrote a post-trial letter in which she started out by stating, "I was the only person in the room that did not think he was totally guilty." *United States v. Gonzales*, 227 F.3d at 521. The juror then discussed her "gut feelings" and what the other jurors thought, relating statements made by the other jurors during deliberations. *United States v. Gonzales*, 227 F.3d at 522. That is vastly different from Mr. Maras's case wherein the jurors told the judge the basis for their question to the court and how they interpreted the jury instructions to allow for a "third person" form of stalking conviction, resolving the perceived ambiguity by convicting Mr. Maras of "third person" stalking.

On page 6 of the Brief for Commonwealth, the appellee cites *Tanner v. United States*, 483 U.S. 107 (1987), in support of its argument that FRE 606(b) should apply in Mr. Maras's case. The appellee points out that in *Tanner*, the Supreme Court rejected the argument that FRE 606(b) is unconstitutional and explained that the prohibition against impeachment of a verdict by the testimony of a juror is part of the common law. But in *Tanner*, the Supreme Court also made the point that communications by jurors before the verdict is rendered do not violate the rule or the common law. "Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. [Citations omitted]." (Emphasis in original). *Tanner v. United States*, 483 U.S. at 127. In Mr. Maras's case, the jurors actually brought up the matter of the meaning of the jury instructions before rendering the verdict. (TR 80-85, 88-96).

It is most telling that the Commonwealth says nothing in its brief about the purposes of RCr 10.04. In *Commonwealth v. Abnee,* 375 S.W.3d 49 (Ky. 2012), this Court addressed the underlying reasons for the rule:

> The rule serves several important purposes. It aids in protecting the sanctity and finality of judgments based upon jury verdicts. It promotes open and frank discussion among the jurors during deliberations. By barring the use of a juror's testimony to attack a verdict, the rule protects individuals who have served on juries from potentially corruptive influences that, in the hope of altering a verdict, might otherwise be brought to bear against a former juror.

Abnee, 375 S.W.3d at 53. In Mr. Maras's case, the discussion with the trial judge and the juror's voluntary and spontaneous explanation about the jury instruction question and how the jury resolved the question in no way involved any danger of "corruptive influences" or harassment of the jurors by the parties.

The Commonwealth responds to the argument that Mr. Maras was convicted of a crime that does not exist in Kentucky[2] in the same way that the Court of Appeals dealt with the issue – by simply declaring that "the Commonwealth presented sufficient evidence at trial to support the jury's verdict finding the appellant guilty of stalking in the first degree[.]" (Brief for Commonwealth, p. 9). Neither the Commonwealth nor the Court of Appeals did any analysis of the applicable statutes and neither addressed the evidence at trial. The Court of Appeals simply concluded that:

> The jury in this case did not charge (or convict) Appellant with a crime that does not exist; it convicted him of

[2] "Clearly, a conviction for a non-existent crime cannot stand." *Hall v. Commonwealth*, 337 S.W.3d 595, 600 (Ky. 2011)(Citing to *United States v. Castano*, 543 F.3d 826, 836 (6th Cir. 2008)). This Court described *Castano* as "holding that conviction must be reversed because erroneous jury instructions created possibility that defendant was convicted of non-existent offense." *Hall v. Commonwealth*, 337 S.W.3d at 600, n. 8. Here there is more than a mere possibility of a conviction for a non-existent offense; the jury definitely convicted Mr. Maras of a non-existent offense.

> stalking in the first degree. This fact is conclusively supported by the record.

(Appendix A4, Brief for Appellant). Whether there was sufficient evidence to support the verdict is not the issue. The issue is whether a conviction for a nonexistent offense can stand. Unquestionably, it cannot. *Hall v. Commonwealth*, 337 S.W.3d 595, 600 (Ky. 2011).

The Commonwealth does not take issue with the clear evidence that Kentucky is one of only eleven jurisdictions that do not criminalize the "creation of fear for the safety of a third person" form of stalking. (See Appendix D, Brief for Appellant). Moreover, the Commonwealth does not argue that our stalking statute actually criminalizes "other person" stalking. Rather, the Commonwealth seems to be arguing that the jury *could have* convicted under a "fear for her own safety" theory; therefore, it matters not that the jury actually rejected that theory and convicted under the "fear for others" theory, which is not a crime in Kentucky. But *Hall v. Commonwealth*, *supra*, requires reversal because the possibility of conviction for a non-existent offense is all that is required.

CONCLUSION

For the foregoing reasons, the appellant, Theodore Anthony Maras, respectfully submits that the judgment of conviction entered by the Jefferson Circuit Court on stalking in the first degree must be reversed and the case remanded for dismissal of the Count One of the indictment.

BRUCE P. HACKETT
Chief Appellate Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Appellant

DANIEL T. GOYETTE
Louisville Metro Public Defender
Of Counsel