

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & TRIBULATIONS

Court erred admitting firearm evidence on stalking charge

The conviction of James Curley, a former Town of Ramapo police officer, was vacated by the U.S. Court of Appeals for the Second Circuit last week based upon a finding that the trial court abused its discretion.

James was convicted in 2009 of stalking and harassing his wife, Linda, in the summer and fall of 2006 in violation of 18 U.S.C. §§ 2261A and 2262(a)(1), *United States v. Curley*, __ F.3d __, 2011 WL 1532212 (April 25).

A three-judge panel ruled that the trial judge, U.S. District Court Judge for the Southern District of New York Stephen C. Robinson, admitted evidence: (1) that James' brother previously beat Linda and pressured her to lie about the brother's assault of a police officer; and (2) that police stopped James 14 months after he stalked Linda, and found firearms in the vehicle while he was driving a reportedly stolen rental car.

Facts

James had demanded a divorce from Linda in May 2006 after 12 years of marriage. During the ensuing month, Linda reported that James threatened to kill her on three separate occasions.

First, during an argument, James threatened to "leave [her] body in a pool of blood." Second, while they were in the car with their two children, James again threatened to kill her and promised he would not go to jail if he did. The final time, after James returned from a walk, he told her, "I found a place today where I could kill you and nobody would hear you scream." *Id.* *1.

James followed these threats by filing for divorce in July 2006 on the ground of infidelity, and Linda returned the favor by filing for divorce and seeking an order of protection and custody of their children. From July to August 2006, Linda regularly noticed that James began following her in his truck and, once the order of protection was in place, tracked her through a global positioning system device he put on her car.

The device was discovered by an auto mechanic in New Jersey and turned over to the police after James had driven from New York to the repair shop in an unsuccessful attempt to

recover the device.

James was indicted in the Southern District of New York in 2008 with two counts of interstate stalking and one count of interstate violation of a protection order.

Trial

The trial commenced in March 2009, and the trial court allowed the government to introduce extensive evidence of James' alleged abuse of Linda, including four violent acts that were either "inextricably intertwined with the charged conduct" under Rule 404(b) of the Federal Rules of Evidence or evidence "relative to the issue of intent" under Rule 403, *Id.* *2. This evidence included acts of shoving and banging Linda's head against the floor in 1991; pushing her into a door while pregnant in 2001; pushing her into a wall while pregnant in 2005; and grabbing her in 2006 while she held their infant son and not letting her go.

The trial court also permitted evidence that James' brother, Michael, had beat Linda in 1990 and that James had instructed her not to report the incident to the police. Additionally, Linda was permitted to testify that she was pressured by both brothers to give false testimony at Michael's criminal trial for assaulting a police officer and resisting arrest in 1994, and subsequent civil action against the police.

The trial court reasoned, "it ... [was] fair for [Linda] to say part of the reason that [she] was in fear was that [she] knew that the defendant would be assisted by his family members" because the government had to establish Linda's reasonable fear, *Id.* The trial court indicated that several incidents, including evidence that James' sister followed Linda in 2006, formed a basis for Linda's fear that "this Curley clan ... will come after her."

The court also permitted the government to introduce evidence seized from James' rental car during a traffic stop in January 2008 after he had fled on foot and was captured. Inside the car was found a handwritten and undated "Last Will and Testament" directing his sister "to take care" of his two children, *Id.* *3.

Also recovered from the car were three rifles, a ski mask,

Continued ...



By JAMES S. WOLFORD

Daily Record
Columnist

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

ammunition and a bulletproof vest — all submitted by the government to show James was planning to murder Linda and then commit suicide. After a 10-day trial, James was convicted of interstate stalking and interstate violation of the protective order and sentenced to five years in prison.

The decision

Judges Dennis Jacobs, Richard Wesley and Denny Chin heard oral argument on Jan. 13 and Judge Chin, writing for the panel, found that the trial court did not abuse its discretion by admitting evidence that James had abused his wife. Judge Chin identified that James' abuse of Linda in August 2006 was part "of or inextricably intertwined with the charged conduct. He grabbed Linda while she was holding their one-year-old son during the same period that he was tracking her with the GPS device. This act was directly relevant to his intent and her fear," *Id.* *6.

Likewise, the abuse of Linda in 1991, 2001 and 2005 was allowable because "[w]here the charged conduct involves domestic abuse, a spouse's history of domestic violence is relevant to show intent to harass or intimidate his partner," *Id.* Additionally, even though "the incidents predated the charged conduct by as much as 15 years, collectively they demonstrate a pattern of activity that continued up to the time of the charged conduct," *Id.*

However, the panel found that the trial court abused its discretion by permitting Linda to testify that her brother-in-law beat her in 1990 and that James later pressured her to lie in court. Judge Chin wrote that "this evidence was not sufficiently similar to the charged crimes [traveling across state lines to harass] to allow the jury to reasonably infer Linda's fear ... [as] there was no allegation that [James] conspired with his brother or his family to commit these crimes," *Id.* *7.

Furthermore, Michael's activities "did not parallel any of the underlying conduct" and there was a "high risk" the evidence would unfairly prejudice James and there was "a risk that the jury indeed would speculate that the 'Curley clan' was coming after Linda, rather than focusing on the allegations in the indictment," *Id.*

Interestingly, although the trial court issued an instruction to the jury regarding the evidence's limiting purpose, the Second Circuit found "that the instruction was not sufficient, given the low probative value of the evidence and the high risk of prejudicial effect ... [m]oreover, the instruction did not come until well after the evidence was presented and after summations," *Id.* The court further reasoned, "[b]ecause this evidence had a greater risk of prejudice than the testimony of [James'] abuse of Linda, a single instruction in the jury charge was not sufficient," *Id.*

Similarly, there was a real chance of prejudice and insufficient probative value in the details of the 2008 traffic stop, which was too attenuated from the 2006 activities. Judge Chin wrote:

"[T]o relate traffic stop evidence to the charged conduct, the jury had to construct a tenuous and unduly long chain of inferences without any further evidentiary guidance. The jury would have had to infer that: [James] wrote the will because he expected to die; he provided in the will for a guardian for his children because he expected Linda to die as well; he was going to use rifles to kill Linda first; he was then going to commit suicide, perhaps 'suicide-by-cop'; and, finally, he had the same intent to kill Linda 14 months earlier," *Id.* *8

Furthermore, the combination of the rifles, ammunition, a bulletproof vest and a ski mask in a "rented car certainly show that [James] was behaving bizarrely, and that he might well have been planning a violent criminal act of some kind; but it is a stretch to conclude from this evidence that 15 months earlier [James] intended to kill Linda ... [since] none of the evidence of [James'] longstanding physical abuse of Linda involved firearms," *Id.* Not to mention the fact that such evidence "was certain to arouse the jury's emotions against [James] because it was significantly more sensational and disturbing than the charged crimes. The introduction of guns into the trial was especially troubling because it tended to show [James] was more violent and disturbed than appeared from the other evidence," *Id.* *9.

Once again, the court identified that the limiting instruction did not suffice to protect James because the evidence "had little probative value ... and its primary effect was to show [James'] bad character and incite the jury. The jury would have great difficulty isolating the evidence's minor probative value from its inflammatory nature. The only proper approach was to exclude the evidence entirely," *Id.* at *10. The court found that the improper admission of this evidence was not harmless, vacated the conviction and remanded for a new trial.

The inevitable question raised by the Second Circuit's holding is whether the court's admonitions will translate into other areas. For instance, the government is frequently permitted to introduce evidence during drug conspiracy trials that the defendant possessed a firearm during the conspiracy timeframe, or sometimes prior to said conspiracy. Defense practitioners often attempt to "unring this bell" to no avail.

The Second Circuit clearly agrees that evidence of firearms can be very troubling and prejudicial when a defendant has not been charged with their possession. Thus, the liberal admission of firearms at trial will perhaps no longer be tolerated.

James S. Wolford is a partner with The Wolford Law Firm LLP and practices in the areas of commercial, personal injury, employment and criminal litigation.