

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002112-MR

CONNIE JOHNSON

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 04-CR-00198

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

MOORE, JUDGE: This is an appeal by Connie Johnson from the circuit court's denial of her motion for a directed verdict. Upon review, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 6, 2004, the day in question, Connie Johnson and her three children arrived at the home of Robin McFern, Johnson's sister, around 2:25 p.m.

Johnson's mother, Marlene Pearson, was already at McFern's home. Pearson testified that

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

upon arrival, the three children got out of the car, stayed with Pearson all day, and never reentered Johnson's car that day. Pearson attested that Johnson exited the car, opened the trunk, obtained a bottle of tequila, and began drinking the tequila. Pearson testified that Connie had not consumed any alcohol for about eleven months, but that day Johnson drank "quite a bit" of tequila, having "one glass after the other." Johnson began drinking about ten to fifteen minutes after she arrived at McFern's home. According to Pearson, Johnson remained at McFern's for an hour and a half to two hours. Johnson told Pearson that she was going to the house of a friend, Ethel Phillips. It was Pearson's testimony that Johnson then got into the car alone and drove away. About twenty minutes after Johnson's departure, Pearson heard a big bang and presumed Johnson had an automobile crash.

Emily Lamb, a resident of McFern's neighborhood, testified that at approximately 4:30 p.m., Johnson pulled into Lamb's driveway, screaming profanities from the car. Johnson's speech was random and did not make sense. Lamb testified that she saw three minor children in the car with Johnson. After Lamb told Johnson to leave the premises, Johnson drove away slowly but not erratically. Over a fifteen minute period, Lamb heard Johnson screaming more profanities at high volume and observed Johnson driving erratically over nearby driveways and through fields. At 4:43 p.m., Lamb dialed 9-1-1 to report Johnson's behavior.

Between the time of making the 9-1-1 call and the arrival of the police, Johnson drove to Phillips's home, pulling her car into the driveway. Johnson's three

minor children were not with her. Remaining in her car, she spoke to Phillips for a moment and then proceeded to pull out of the driveway. Backing up, Johnson wrecked her car in a ditch on George Eskildsen's property, located directly across from Phillips's house. It took approximately thirty minutes for Eskildsen to tow Johnson's car from the ditch.

Deputy Steve Oakley of the Marshall County Sheriff's Office arrived at the scene of the automobile crash at approximately 5:15 p.m. Johnson's children were not at the scene of the crash. Deputy Oakley administered several field sobriety tests, all of which Johnson failed. He then placed Johnson under arrest for Driving Under the Influence (DUI). Once inside Deputy Oakley's patrol car, Johnson began kicking the doors and ceiling of the vehicle while screaming obscenities. Deputy Oakley then subdued Johnson with pepper spray and took her to the Marshall County Hospital for blood and urine tests. Because of Johnson's behavior when being placed into the patrol car, Deputy Oakley requested assistance from the Benton Police Department. After entering the hospital, Johnson cursed, screamed, and attempted to bite Captain Knight of the Benton Police Department. Hospital personnel stated that Johnson needed to leave the hospital because of her behavior. Johnson was charged with DUI and taken to jail.

The day following Johnson's arrest for DUI, Lamb gave a statement to police regarding her initial encounter with Johnson. Police were previously unaware of this encounter. In light of this new information, Deputy Oakley subsequently charged Johnson with Wanton Endangerment in the First Degree.

Johnson was indicted on three counts of Wanton Endangerment in the First Degree, one count for each child present in her vehicle. Johnson was also indicted on one count of Disorderly Conduct and one count of Driving Under the Influence. A jury convicted Johnson of three counts of Wanton Endangerment in the Second Degree, Disorderly Conduct, and Driving Under the Influence. Johnson was sentenced to twelve months of imprisonment. Johnson now appeals her convictions for three counts of Wanton Endangerment in the Second Degree.

II. STANDARD OF REVIEW

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. [*Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983).]

As stated in *Sawhill*, there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991).

III. ANALYSIS

Johnson argues that she was denied due process of law when the trial court denied her motions for directed verdict, both at the close of the Commonwealth's case and at the close of her evidence, due to the insufficiency of the evidence regarding the wanton endangerment charges. It is Johnson's claim that the Commonwealth produced no evidence that she was driving under the influence at the time her children were in her vehicle.

At trial, Pearson, Johnson's mother, testified that Johnson arrived at McFern's at 2:25 p.m. Between 2:35 p.m. and 2:40 p.m., Johnson began drinking tequila. Pearson testified that Johnson was drinking quite a bit and that Johnson had not consumed alcohol for the past eleven months. Between 3:55 p.m. and 4:25 p.m., Johnson left McFern's. Pearson testified that Johnson's children were not in the car with Johnson when Johnson left McFern's.²

It was Lamb's testimony, however, that Johnson pulled into Lamb's driveway at 4:30 p.m. with three children in her vehicle. By 4:43 p.m., Lamb saw Johnson driving erratically and called 9-1-1. Between 4:43 p.m. and 5:15 p.m., Johnson wrecked her automobile into a ditch.

Kentucky Revised Statute (KRS) § 508.070(1) reads that “[a] person is guilty of wanton endangerment in the second degree when he wantonly engages in

² The Commonwealth, through cross-examination, informed the jury that Pearson, who testified that the children were not in her daughter's car, had herself been convicted in the past of a similar offense of wanton endangerment involving two of the same children who were involved in the present matter.

conduct which creates a substantial danger of physical injury to another person.” KRS § 501.020(3) defines “wantonly” as follows:

[a] person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

Johnson was charged with and convicted of DUI. Johnson does not contest that she was driving under the influence. Therefore, it is reasonable for the jury to believe that when Johnson climbed into her car, she was under the influence. It is unrealistic to suggest that Johnson began drinking around 2:30 p.m., began operating her vehicle around 4:00 p.m., was under the influence of alcohol by 5:15 p.m., but was not driving under the influence when her children were in the car at 4:30 p.m. It is reasonable for the jury to believe that Johnson was driving under the influence of alcohol when her children were in the car, particularly considering that the Commonwealth presented evidence through Lamb's testimony that Johnson was operating the vehicle with three children in the car. Thus, the evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Johnson wantonly endangered her three children. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, the trial court properly denied Johnson's motion for a directed verdict. Accordingly, the Marshall Circuit Court's denial of Johnson's motion for a directed verdict is affirmed.

ALL CONCUR.

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