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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001206-MR

CHRISTOPHER CULVER — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 14-CR-00178

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND THOMPSON, JUDGES.

LAMBERT, D., JUDGE: Christopher Culver appeals the multiple convictions and sentences handed down by the Nelson Circuit Court following a two-day jury trial in this matter. He asks this Court to review whether the trial court appropriately denied his directed verdict motion on each count, and whether double jeopardy protections preclude conviction on a certain combination of his charges.

After careful review, we conclude that the evidence was sufficient to allow the jury to consider the first-degree wanton endangerment, the theft by unlawful taking, fleeing and evading police, and persistent felony offender ("PFO") charges. We also conclude that double jeopardy does preclude convictions on the combination of second-degree wanton endangerment and first-degree fleeing or evading. Consequently, we affirm the convictions for the first-degree wanton endangerment, theft by unlawful taking, fleeing or evading, and PFO charges. On the other hand, we vacate the conviction on the second-degree wanton endangerment charge.

I. FACTUAL AND PROCEDURAL HISTORY

Culver's conviction stems from a confluence of events beginning in the early morning hours of December 15, 2012. Audrey Dragoo picked up her boyfriend and drove him home in his vehicle after a night of drinking, leaving her own red Hyundai Tiburon parked in a church parking lot in Bardstown. Elsewhere, Nelson County Deputy Reece Riley responded to a domestic disturbance call from which a suspect had escaped in a red vehicle. Riley requested that other law enforcement officers be on the lookout for a red car in the area.

At approximately 2:15 A.M., while on patrol, Bardstown Police Officers Michael Medley and Nathan Phillips spotted a red car parked in a church

parking lot. Phillips observed from a cruiser in the parking lot of a gas station across the street from the church as Medley, in his own cruiser, approached the red car in the church parking lot. Medley observed a man standing between the passenger side of the red car and a beige Buick LeSabre. The man retreated into the Buick and began to drive away slowly as Medley entered the parking lot.

As he grew closer, Medley discovered that the red car had been broken into, and radioed Phillips. Phillips engaged his light bar and siren to signal the Buick to pull over. Rather than comply, the Buick fled down Springfield Road at approximately 65-70 miles per hour, with Phillips in pursuit and Medley behind Phillips. The Buick led the officers on an eight mile chase along several winding roads at speeds ranging from 65-80 miles per hour.

Riley, upon learning of the chase, and believing the driver of the Buick might be his own missing suspect, joined the pursuit from a different location. In his attempt to catch up to the other vehicles, he drove at an estimated speed of 90 miles per hour. Riley eventually lost control of his vehicle going around a curve, skidded off an embankment, and hit a tree. Though uninjured, Riley could no longer continue the pursuit.

Phillips and Medley, meanwhile, had lost sight of the Buick, because it was driving so much faster than they believed they could safely pursue. They

discontinued their own pursuit after losing sight of the Buick and learning of Riley's crash. Medley returned to the church parking lot to investigate the red car.

Medley's investigation of the red car in the church parking lot turned up significant evidence. He found the passenger side window broken, with shards of glass littering the front passenger seat and floor. Medley also found blood on the passenger seat headrest, on the shift knob, and the seats, which he collected for DNA analysis. The car's stereo had also been ripped out. Upon running the license plate, Medley learned that the vehicle was owned by Audrey Dragoo, who provided law enforcement with an inventory of missing items the following day. Dragoo estimated that the total value of the items stolen from her vehicle at $929.

On January 22, 2013, Detective Lynn Davis of the Bardstown Police Department was at Culver's home investigating an unrelated matter when he noticed a Buick fitting the description of the one involved in the vehicle break-in and chase with Medley and Phillips the previous month. Davis ran the plate, revealing that Culver's father owned the vehicle. Davis also photographed the Buick, which Culver's acquaintances identified as Culver's vehicle.

At Davis' request, forensic technician, Katie Hartman, arrived and performed a buccal swab on Culver. Subsequent genetic testing would reveal a complete match—at all loci—between the buccal swab taken from Culver and the blood taken from Dragoo's car.

Culver was indicted, and proceeded to trial. After the close of evidence, Culver moved for directed verdict, which the trial court denied. The jury convicted Culver of the following offenses: two counts of wanton endangerment in the first degree (of Medley and Phillips), one count of misdemeanor wanton endangerment in the second degree (of Riley), one count of fleeing or evading police in the first degree, one count of theft by unlawful taking of the value of $500 or more, and being a PFO in the first degree. The two prior felony convictions supporting the PFO charge came in 2009 in Nelson Circuit Court and in 2010 in Jefferson Circuit Court.

The jury recommended a PFO-enhanced sentence of 12 years to serve on each of the felony counts, and 30 days for the misdemeanor. The trial court sentenced Culver accordingly, though directing the sentences be served concurrently. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

When ruling on a motion for directed verdict by a criminal defendant, the trial court should only grant a defense motion for directed verdict if the Commonwealth's offered proof amounts to "no more than a mere scintilla of evidence[.]" *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013). The court is to examine the evidence as a whole, assume the truth of the

Commonwealth's evidence, draw all fair and reasonable inferences in favor of the Commonwealth, and refrain from intruding upon the jury's role of evaluating weight and credibility. *Id.*

On appeal, our review is limited to a determination that "if, under the evidence [taken] as a whole, it would be clearly unreasonable for a jury to find the defendant guilty[.]" *Wilburn v. Commonwealth*, 312 S.W.3d 321, 323 (Ky. 2010) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). Even contradicted proof is sufficient to support a conviction if the fact-finder assigns it sufficient weight. *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

This standard of review applies whether the evidence is direct or circumstantial. "First, we stress that Appellant is incorrect to imply that a different standard of review is required in evaluating whether or not a directed verdict should have been granted in cases involving circumstantial evidence[.]" *Commonwealth v. Collins*, 933 S.W.2d 811, 815 (Ky. 1996).

B. SUFFICIENCY OF THE COMMONWEALTH'S EVIDENCE TO SURVIVE A DIRECTED VERDICT MOTION

1. THE EVIDENCE ADEQUATELY SUPPORTED THE CHARGE OF WANTON ENDANGERMENT IN THE FIRST DEGREE

Culver argues that the Commonwealth failed to offer sufficient proof on two issues relating to the charge of wanton endangerment in the first degree:

that he was the driver of the Buick that led the officers on the high-speed chase, and that he acted with the requisite culpable *mens rea*.

The issue of the identity of the driver of the Buick, much like many other issues in this case, is based largely on circumstantial evidence. "Although circumstantial evidence 'must do more than point the finger of suspicion,' the Commonwealth need not 'rule out every hypothesis except guilt beyond a reasonable doubt.'" *Ratliff v. Commonwealth*, 194 S.W.3d 258, 267 (Ky. 2006) (internal citations omitted). While it is true that neither Medley nor Phillips testified that they could positively identify the man lurking between the Buick and Dragoo's red Tiburon, physical evidence positively and quite conclusively[1] identified Culver as being at the scene. Culver's friend, Ronnie Stein, testified that Culver was known to drive a Buick of the same make and model as that seen by Medley and Phillips. The Commonwealth also introduced a traffic citation issued to Culver while driving a Buick of the same make and model.

Thus, the Commonwealth provided more than a mere scintilla of evidence and could allow a fact-finder to infer that Culver was the driver of the Buick that led police on the chase. Any other arguments made by Culver regarding his identity, at this point go to the weight of the evidence.

[1] Forensic scientist, Megan Duff, testified during trial that the odds of another person matching the genetic profile were 1 in 16,000,000,000,000,000,000.

Culver also contends that the Commonwealth lacked sufficient evidence relating to his state of mind to commit the offense of first-degree wanton endangerment. This offense is defined in KRS 508.060:

> A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

However, we must necessarily consider the statutory definitions of the terms "wantonly" and "serious physical injury" in evaluating the evidence.

Wanton behavior, under KRS 501.020(3), is behavior which evinces both an awareness and conscious disregard of a "substantial and unjustifiable risk that the result will occur[,]" and further that "[t]he 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[.]"

A serious physical injury, for the purposes of the criminal law of Kentucky, is a "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(15).

Culver correctly notes that not every "hypothetical scenario of 'what might have happened'" represents a substantial risk of death or serious physical

injury (*McCleery v. Commonwealth*, 410 S.W.3d 597 (Ky. 2013)), and argues that his conduct did not rise to the level of wantonness, by comparing his own behavior to that found in our case law.

In *B.B. v. Commonwealth*, 2014 WL 1998725 (Ky. App. 2014),[2] a teenage driver proceeded through a curve at a rate of speed approximately 15 miles per hour above the posted speed limit, causing him to lose control, and his vehicle to flip, killing a passenger. This Court reversed his conviction, holding that no evidence showed that B.B. had acted with extreme indifference to the value of human life.

The Kentucky Supreme Court likewise reversed a conviction for first-degree wanton endangerment in *Shouse v. Commonwealth*, 481 S.W.3d 480 (Ky. 2015), where a mother took the anti-anxiety drug, alprazolam, and drove around on a spare tire with her two-year-old daughter in the vehicle. The Supreme Court reasoned that, absent evidence of actual intoxication, the defendant's behavior had not demonstrated an "extreme indifference to the value of human life[.]" *Id.* at 489.

This Court reversed a trial court's denial of a motion for directed verdict in *Ison v. Commonwealth*, 271 S.W.3d 533 (Ky. App. 2008). The defendant had driven at an excessive speed in wintry conditions with extremely

[2] Culver, noting the dearth of decisions in vehicular wanton endangerment cases which involve simple speeding, cited this unreported case pursuant to Civil Rule ("CR") 76.28(4)(c).

worn tires, lost control, and crashed into another vehicle, killing three people. Even under those facts, the Court concluded that the defendant's actions did not indicate a manifest indifference to the value of human life. Further, the Court held that "[a]bsent proof sufficient to satisfy the elevated wantonness element of first-degree assault and first-degree wanton endangerment, it was 'clearly unreasonable for [the] jury to find' that Ison was guilty of either charge." *Id.* at 537 (quoting *Benham* at 187).

By contrast, the Supreme Court upheld the conviction of the defendant in *Brown v. Commonwealth*, 297 S.W.3d 557 (Ky. 2009). There the defendant attempted to evade a DUI checkpoint by leading police on a chase at speeds reaching 80 miles per hour in an area with a posted limit of 25-35 miles per hour. In addition to the excessive speed, the defendant, by driving down the center of the road, also forced an oncoming motorist to swerve out of the way to avoid a head-on collision. *Id.* at 559. *Brown* is the most factually similar to the instant matter, given that it involves a police chase situation.

Medley testified that he and Phillips broke off their pursuit because they felt unsafe driving at that speed on those roads. This testimony was enlightening as to how dangerous Culver was driving, given that trained officers considered it too dangerous to pursue him any further. In light of this testimony and the ruling in *Brown*, we must disagree with Culver that the evidence fails to

satisfy the wantonness element of the offense. Much like the Court in *Brown*, we must conclude that it would be reasonable for a jury to find him guilty of first-degree wanton endangerment, and the trial court properly permitted them to do so.

2. THE EVIDENCE ADEQUATELY SUPPORTED THE CHARGE OF FLEEING OR EVADING POLICE IN THE FIRST DEGREE

KRS 520.095 defines the offense of fleeing or evading police in the first degree, and describes the elements.

> (1) A person is guilty of fleeing or evading police in the first degree:
>
> > (a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:
> >
> > ….
> >
> > > 4. By fleeing or eluding, the person is the cause, or creates a substantial risk, of serious physical injury or death to any person or property[.]

KRS 520.095(1)(a)(4).

Behavior which satisfies the elements of this offense, according to the Court in *Brown*, also satisfies the elements of wanton endangerment in the second degree. "Both provisions are satisfied by proof of wantonly engaging in certain conduct which creates a substantial danger of serious physical injury to another

person." *Id.* at 562. Under the statute, a less culpable state of mind is required for conviction than first-degree wanton endangerment.

Here, the evidence established that Culver ignored the signals of a marked police cruiser and drove away at an excessive rate of speed, at times reaching 25 miles per hour above the posted speed limit on winding roads. Given that Medley testified that he terminated his pursuit because he feared for his safety, we find that the Commonwealth presented adequate proof to survive a directed verdict motion as it relates to this charge.

3. THE EVIDENCE ADEQUATELY SUPPORTED THE CHARGE OF THEFT BY UNLAWFUL TAKING

The offense of theft by unlawful taking is defined in KRS 514.030. "[A] person is guilty of theft by unlawful taking … when he unlawfully… [t]akes or exercises control over movable property of another with intent to deprive him thereof[.]" KRS 514.030(1)(a). This offense is a Class D felony when the value of the property so taken exceeds $500. KRS 514.030(2)(d).

Culver makes a similar argument regarding proof of identity as above. However, as it relates to this offense, direct physical evidence establishes an inference of his guilt. Culver's blood was found smeared and spattered on multiple interior surfaces of Dragoo's car. Additionally, his flight from police supports an inference of consciousness of guilt. "As a general rule, proof of flight to elude

capture or prevent discovery is admissible because 'flight is always some evidence of a sense of guilt.'" *Day v. Commonwealth*, 361 S.W.3d 299, 303 (Ky. 2012) (quoting *Rodriguez v. Commonwealth*, 107 S.W.3d 215 (Ky. 2003)).

The greater share of Culver's efforts, however, is spent on arguing the insufficiency of the proof of the value of the items stolen. When establishing the value of stolen property as an element of an offense, "the Commonwealth must prove the market value of the stolen items at the time and place of the theft." *Commonwealth v. Reed*, 57 S.W.3d 269, 270 (Ky. 2001) (citing *Perkins v Commonwealth*, 409 S.W.2d 294 (Ky. 1966)).

The entirety of the evidence of the value of the stolen property came from the testimony of Dragoo. Culver takes the position that because the Commonwealth made no effort to investigate or verify the values Dragoo assigned to her property, this evidence was somehow lacking. This position is refuted by *Reed*. "We do not dispute that an owner may offer an opinion regarding the value of merchandise. But the testimony must have sufficient detail for the jury to make a value determination." *Id.* at 271.

Drago testified that the value of the property stolen from her totaled approximately $929. The most expensive item taken from her vehicle was jewelry, which she testified consisted of 14 inserts, which she purchased at a cost of $25 to $55 each. Dragoo estimated the total value of the jewelry collection at $500. She

estimated the value of the stolen car stereo at $100, because it was "nothing fancy." Along with the stereo, the thief took nine audio CDs, which Dragoo valued at $10 each, despite purchasing them for $12-13 each. Among the stolen property was a jacket, given to her as a gift, which had been purchased on sale at a price of $80. Dragoo testified that she had replaced the jacket, paying full price, but felt it would be unfair to assign a value greater than the sale price. Eight tubes of hair color were also taken, priced at $8 each for a total loss of $64. Dragoo testified that she had two tennis racquets in the car, for which she had paid $15-25 each, but in the interest of fairness, she valued them at $15 each. A purse was also stolen from the car, which Dragoo valued at $40. Though unsure of the actual price of the purse, she established its value at $40, because she had never paid more than $60 for a purse. Finally, a set of jumper cables was missing. Dragoo testified that she had paid $25 for the cables.

Culver took the position that Dragoo's value estimates were inflated because they did not discount enough from the purchase price because the items were all used. Culver explored this issue on cross-examination of Dragoo.

In this Court's view, Culver's argument goes to the weight and credibility of the testimony for the jury, not the sufficiency of the valuation as an element of the offense. Moreover, Dragoo's testimony, even factoring out the less detailed and more speculative valuations, establishes a value for the stolen property

well above the felony threshold. We cannot conclude the trial court erred in denying directed verdict as it related to this charge.

4. THE EVIDENCE ADEQUATELY SUPPORTED THE FIRST-DEGREE PFO CHARGE

In order to have a sentence enhanced as a first-degree PFO, the Commonwealth must prove that the defendant is older than age 21, has at least two prior felony convictions, and the defendant was older than age 18 at the time of the commission of those prior felonies. KRS 532.080(3).

In this matter, the Commonwealth introduced evidence in the form of judgments from Culver's prior felony convictions, a 2010 conviction from Jefferson County and a 2009 conviction from Nelson County. Culver argues that because the 2009 judgment did not reflect the date of the offense, then the Commonwealth did not adequately prove the offense occurred after he had reached age 18. While conceding that reasonable inferences can support a finding that he was over 18 under *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002), Culver argues that this should be limited to calculating his age based on his date of birth. Extending that argument, he contends that it was mere speculation that he was over age 18 at the time of the offense simply because he was 33 years old at the time of conviction in that matter.

We find Culver's position disingenuous. Culver turned 18 years old in 1994. The jury would have been free to infer that the 2009 prosecution was timely and had not been delayed for more than fifteen years. Moreover, the jury could have inferred the fact that he was over age 18 at the time of the offense from the plain fact that the 2009 judgment was available to them, as opposed to having been expunged after Culver reached majority, if in fact the offense had been committed prior to 1994.

The trial court did not err in denying the directed verdict motion as it related to this charge.

C. DOUBLE JEOPARDY PRECLUDES A CONVICTION ON BOTH WANTON ENDANGERMENT IN THE SECOND DEGREE AND FLEEING OR EVADING POLICE IN THE FIRST DEGREE

The Kentucky Supreme Court has previously held that the same instance of conduct cannot be punished as two separate offenses unless those two offenses pass the "same elements test" set forth in *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct 180, 76 L.Ed 306 (1932). *Clark v. Commonwealth*, 267 S.W.3d 668, 675 (Ky. 2008) (citing *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996); *Blockburger*). *Clark* prohibits the Commonwealth from carving multiple offenses out of "a single criminal episode." *Clark* at 678 (quoting *Jones v. Commonwealth*, 756 S.W.2d 462 (Ky. 1988)).

This Court need not perform its own analysis of the law here for two reasons. First, the Commonwealth conceded this point in its brief to this Court. Second, this Court need not analyze the issue because, as noted above, the Kentucky Supreme Court already has, applying the *Blockburger* test:

> Second-degree wanton endangerment, however, requires proof of no fact beyond first-degree fleeing or evading police. Both provisions are satisfied by proof of wantonly engaging in certain conduct which creates a substantial danger of serious physical injury to another person. For second-degree wanton endangerment, the conduct is general and open-ended; for first-degree fleeing or evading police, the conduct is specified as intentionally fleeing from police while operating a motor vehicle. It follows, therefore, that once the Commonwealth proved the specific conduct required to convict Appellant of first-degree fleeing or evading police, it necessarily proved the general conduct necessary to convict him of second-degree wanton endangerment, too.
>
> Consequently, Appellant's convictions for first-degree fleeing or evading police and second-degree wanton endangerment constitute double jeopardy.

Brown v. Commonwealth, 297 S.W.3d at 562 (Ky. 2009).

Brown also provides us with guidance as to how to remedy the violation. "Given that first-degree fleeing or evading police is a felony and that second-degree wanton endangerment is a misdemeanor, the remedy is to vacate the lesser offenses of wanton endangerment." *Id.* (citing *Clark* at 678).

III. CONCLUSION

This Court, after careful review of the record, the relevant authorities, and the arguments advanced by the parties, concludes that the evidence presented adequately supports the trial court's denial of Culver's directed verdict motions as they related to the charges of wanton endangerment in the first degree, theft by unlawful taking, fleeing and evading police in the first degree, and being a first-degree PFO. The trial court properly allowed them to go to a properly instructed jury, whose verdict is sacrosanct. *See Charles Taylor Sons Co. v. Hunt*, 163 Ky. 120, 173 S.W. 333 (1915). The convictions and sentences relating to these charges are affirmed.

Conversely, we conclude that the trial court committed reversible error by denying Culver's motion for directed verdict as it related to the second-degree wanton endangerment charge. The conviction on second-degree wanton endangerment cannot stand under constitutional scrutiny in light of the fact that Culver was also properly convicted of fleeing and evading police in the first degree. The conviction imposed by the trial court on the second-degree wanton endangerment charge is hereby vacated. We remand for entry of a new judgment of conviction consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General for Commonwealth
of Kentucky

Jeffrey Ray Prather
Assistant Attorney General
Frankfort, Kentucky