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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002837-MR

ANTHONY D. MULLINS — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY NOBLE, JUDGE
INDICTMENT NO. 97-CR-579

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING AND REMANDING

** ** ** ** ** ** **

BEFORE: HUDDLESTON, KNOPF and KNOX, Judges.

HUDDLESTON, Judge. Anthony D. Mullins appeals from a judgment based on a jury verdict finding him guilty of second-degree wanton endangerment, resisting arrest and possession of drug paraphernalia for which he received sentences of twelve months in jail and a $500.00 fine, a $150.00 fine and a $500.00 fine, respectively.[1]

[1] The parties agree, and the jury's verdict reflects, that these are the charges of which Mullins was found guilty. The judgment incorrectly recites that he was found guilty under count 1 of the indictment of wanton endangerment 2nd degree, under count 2 of terroristic threatening, and under count three of menacing. This case will be remanded so that a corrected judgment can be entered nunc pro tunc. See Ky. R. Civ. Proc. (CR) 60.01.

The events leading to Mullins' indictment and conviction occurred in the early morning hours of April 6, 1997. Mullins had a dispute with his sister, with whom he was living, over seventy-five cents which he claimed she owed him as a result of a card game. Each had been drinking. The Lexington Police were notified and officers were dispatched to the scene. Upon their arrival, the officers found Mullins screaming obscenities and tossing his belongings onto the porch. Mullins told his sister that he wanted to move out of her house. Initially Mullins ignored the officers.

The officers offered to call Mullins a taxicab to enable him to move his belongings. Mullins then went back inside the house. The officers went to a side of the house from where they saw Mullins holding a knife while attempting to use a cordless phone. The officers heard Mullins say that he was not going to jail and that he was going to kill his sister and the officers. At that point, the officers decided to arrest Mullins for disorderly conduct and terroristic threatening.

Mullins went to the front of house where he asked Officer James Lynn to help him use the phone. Officer Lynn attempted to subdue Mullins, but Mullins broke free and ran into a bedroom. Mullins reappeared armed with a knife and attacked the officers. The officers sprayed Mullins in the face and eyes with Mace and arrested him. Mullins was then searched and the officers found a crack pipe in his vest.

A jury trial was held on September 30, 1997. After the evidence was presented, Mullins requested a jury instruction on harassment. The jury was given instructions under count 1 of the

indictment for first-degree wanton endangerment, second-degree wanton endangerment, terroristic threatening and menacing. The jury, as noted above, found Mullins guilty of second-degree wanton endangerment, resisting arrest and possession of drug paraphernalia. The jury recommended, and the trial court imposed, a sentence of twelve months in jail and fines totaling $1,150.00. This appeal followed.

Mullins first argument is that the charges were improperly joined. Mullins contends that the possession of drug paraphernalia was a separate and distinct offense from the charges of first-degree wanton endangerment and resisting arrest. He contends that he was "unduly prejudiced by the jury hearing evidence on the drug paraphernalia when deciding the main issue of the felony charge of wanton endangerment first degree."

Ky. R. Crim. Proc. (RCr) 9.12 permits two or more offenses to be tried together if they could have been joined in a single indictment, information, complaint or uniform citation. In allowing joinder of charges the trial court has broad discretion, and its decision will not be overturned absent a showing of prejudice and clear abuse of discretion. Rearick v. Commonwealth, Ky., 858 S.W.2d 185 (1993); Cannon v. Commonwealth, Ky., 777 S.W.2d 591 (1989). Pursuant to RCr 6.18:

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar

character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan. (Emphasis supplied.)

On the issue of joinder the Supreme Court of Kentucky has said that: "Offenses closely related in character, circumstance, and time need not be severed." Cardine v. Commonwealth, Ky., 623 S.W.2d 895, 897 (1981); Sherley v. Commonwealth, Ky., 899 S.W.2d 794, 800 (1994). Thus, when evidence of each crime is simple and the offenses are closely related in time, joinder of those offenses is proper. Brown v. Commonwealth, Ky., 458 S.W.2d 444, 447 (1970).

In the present case, the evidence was simple and all charged offenses joined at trial occurred on the same night and were part of a continuing act. Mullins had possession of the crack pipe during his confrontation with the officers. The trial court properly permitted the charge of possession of drug paraphernalia to be joined with the other related offenses.

Mullins also contends that the trial court erred when it refused his request to instruct the jury on the lesser offense of harassment. A trial court is required to give instructions applicable to every state of the case covered by the indictment and deducible from or supported to any extent by the testimony. Reed v. Commonwealth, Ky., 738 S.W.2d 818, 822 (1987). See also Commonwealth v. Collins, Ky., 821 S.W.2d 488 (1991); Commonwealth v. Sanders, Ky., 685 S.W.2d 557 (1985); Callison v. Commonwealth, Ky. App., 706 S.W.2d 434 (1986). The determination of what issues to submit to the jury should be based upon the totality of evidence. Reed, 738 S.W.2d at 822. Where there is sufficient

evidence to support a reasonable inference concerning the ultimate fact in a case, the issue should be submitted to the jury with appropriate instructions. Callison, 706 S.W.2d at 436. See also Smith v. Commonwealth, Ky., 737 S.W.2d 683 (1987). A defendant is entitled to an instruction on a lesser-included offense if the evidence would permit a jury to find him guilty of a lesser-included offense and acquit of a greater offense. Smith, 737 S.W.2d at 688. See also Martin v. Commonwealth, Ky., 571 S.W.2d 613 (1978). Whether there was sufficient evidence presented at trial to support an instruction is a question of law to be decided by the trial court. Collins, 821 S.W.2d at 491 (1991).

Harassment is defined in KRS 525.070:

> (1) A person is guilty of harassment when with intent to harass, annoy or alarm another person he:
>
> (a) Strikes, shoves, kicks, or otherwise subjects him to physical contact; or
>
> (b) Attempts or threatens to strike, shove, kick or otherwise subject the person to physical contact; or
>
> (c) In a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language to any person present; or
>
> (d) Follows a person in or about a public place or places; or
>
> (e) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy

such other person and which serve no legitimate purpose.

In the present case, the trial court instructed the jury on the offenses of first-degree wanton endangerment, second-degree wanton endangerment, terroristic threatening and menacing. Because the evidence presented at trial did not support a harassment instruction, the trial court did not err in refusing to instruct on that offense. KRS 525.070 seeks to cover minor assaultive conduct which formerly constituted simple assault where the intent is to annoy or alarm a specific individual rather than the public. The evidence showed that Mullins both verbally threatened to kill and "gut an officer," and, in fact, he actually charged at the officers with a knife. Mullins' actions were not intended to harass, annoy or alarm, but to produce a physical injury.

The judgment is affirmed. However, this case is remanded to Fayette Circuit Court with instructions to enter a corrected judgment reflecting the charges of which Mullins was convicted.

ALL CONCUR.

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