

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000788-MR

STANLEY JARMAL SMOTHERS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS PAISLEY, JUDGE  
ACTION NO. 99-CR-00845

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, KNOFF, AND SCHRODER, JUDGES.

KNOFF, JUDGE: By judgment entered March 21, 2000, the Fayette Circuit Court convicted Stanley Jarmal Smothers of first-degree wanton endangerment<sup>1</sup> and second-degree fleeing or evading police<sup>2</sup> and sentenced him to concurrent sentences of one year and six months, respectively. The judgment confirmed a jury verdict finding Smothers guilty of having pointed a handgun at Lavan Franklin and of having fled from police officers who were responding to Franklin's subsequent complaint. Smothers admitted

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<sup>1</sup>KRS 508.060.

<sup>2</sup>KRS 520.100.

having exchanged heated words with Franklin on the day in question, but denied having pointed a gun at him. He also conceded that later the same day he had been a passenger in his cousin Hughes's car during a wild flight from several police officers, but claimed that the flight had been entirely Hughes's doing. Smothers raises two issues on appeal. He contends that he was entitled to a directed verdict dismissing the charge of fleeing or evading. And he complains that the Commonwealth and Hughes, his co-defendant, improperly cross-examined him concerning his guilty plea in an unrelated matter. Persuaded that the improper cross-examination was harmless error and that Smothers is not otherwise entitled to relief, we affirm the trial court's judgment.

The events giving rise to the charges against Smothers took place on July 14, 1999, in Lexington. Franklin testified for the Commonwealth that early that afternoon he had been visiting his girlfriend. He had come out of her house to retrieve something from his car when Smothers and Hughes pulled up in a black Honda. Smothers emerged from the Honda and began yelling at him. Franklin claimed to have had only the most passing acquaintance with Smothers and to have understood neither the content of nor the reason for Smothers's verbal assault. The yelling continued, however, until at one point Smothers told him, "If you want to settle this with guns that's alright with me." Smothers thereupon returned to the Honda, and Franklin turned toward his girlfriend's house. When, a moment later, he turned again toward Smothers, Smothers, he claimed, was pointing a black

pistol at him. The commotion had brought Franklin's girlfriend from her house, and when she saw what was happening she went back inside to phone the police. Smothers then climbed into the Honda's passenger seat, and he and Hughes drove away.

Several hours later, Franklin's testimony continued, between five and six o'clock that evening, he had been in his car on an errand when he saw Smothers and Hughes trying to flag him down. He refused to stop, but, when the two men followed him, he became frightened and drove to the sheriff's department near the district courthouse in downtown Lexington. No sooner did he arrive in the parking lot there and get out of his car than Smothers and his cousin arrived there, too. This time, he alleged, both men got out of their car and approached him, shouting and cursing as they came. Almost immediately, a police officer intervened. The officer ordered Smothers and Hughes to return to their vehicle, which, after a brief resistance, they did, and to keep their hands in sight on the steering wheel and dash board. He then asked Franklin what was going on. Franklin told him about the incident earlier that day and in particular about Smothers's brandishing a gun. The officer then turned to the Honda, approaching it on the driver's side. Suddenly, Hughes had put the Honda into reverse and had attempted to speed backwards out of the narrow parking lot.

Franklin had lost sight of the Honda when it backed around a corner, but several police witnesses testified as to what happened next. Deputy Marlin was the first officer on the scene. He had happened to be in the sheriff's department parking

lot when Franklin, Smothers, and Hughes made their disruptive arrival. He radioed for assistance and then sought to restore order and to investigate. When Franklin told Marlin that earlier Smothers had threatened him with a gun, Marlin turned his attention to the Honda. He testified that he saw Smothers reaching down between the passenger's seat and the passenger's door, that he ordered Smothers to put his hands back on the dashboard, and that he had just come up to the driver's window when Hughes threw the car into reverse and sped away. Marlin saw the Honda hit a parked police car, then veer away from two other police cruisers just arriving on the scene. Other officers testified that Hughes backed the Honda over a median and across Martin Luther King Street. When the police attempted to block the Honda there against the side of the street, Hughes rammed one of the cruisers, backed through a fence, then drove down the sidewalk around the cruisers and out onto northbound Martin Luther King.

One of the cruisers had followed. Its officers decided against a high-speed chase, but managed to keep the Honda in sight until it turned left from Third Street onto Elm Tree Lane. In the roadway at that intersection, they found a box of live handgun shells and an ammunition magazine. A short time later, a citizen turned over to the police a black Beretta pistol that he had just found lying in Elm Tree Lane not far from the Fourth Street intersection. The shells and the magazine matched the pistol. In the meantime, in the 400 block of Chestnut Street, metro-police officers had come upon the abandoned black Honda.

It was registered to Hughes at his mother's address. At that address the police had found and arrested Smothers. Hughes had turned himself in a few days later.

This was the Commonwealth's case. As noted above, Smothers was charged with wanton endangerment for having pointed the pistol at Franklin. He and Hughes were both charged with fleeing or evading police. And Hughes was charged with assault, wanton endangerment, and with leaving the scene of an accident all in conjunction with his operation of the Honda. The cousins were tried jointly in March 2000. Following the Commonwealth's proof, Smothers moved for a directed verdict on the charge of fleeing or evading police. He noted that the statutes establishing this offense apply to one who was "operating a motor vehicle,"<sup>3</sup> and argued that the evidence clearly established that Hughes had been the operator. In denying the motion, the court agreed with Smothers's assessment of the evidence, but ruled that he might still be found guilty of the offense under a complicity instruction.<sup>4</sup> Smothers contends that his mere presence in the Honda is not sufficient proof of his complicity in the flight and that the trial court erred, therefore, by denying his motion to dismiss the charge of fleeing or evading police. We disagree.

It is by now well established in Kentucky that a trial court's denial of a directed-verdict motion will be disturbed on appeal only if, drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, the evidence could not

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<sup>3</sup>KRS 520.095 and KRS 520.100.

<sup>4</sup>KRS 502.020.

induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty.<sup>5</sup> Under the pertinent portions of KRS 502.020, the complicity statute, Smothers could be found guilty of Hughes's fleeing from the police only if he intended to promote or facilitate that offense and then only if he solicited, commanded, or engaged in a conspiracy with Hughes to commit the offense or aided or counseled Hughes in committing the offense.<sup>6</sup> Although we agree with Smothers that a passenger's mere presence in a vehicle does not establish his complicity in the driver's wrongful acts,<sup>7</sup> there was more evidence here than Smothers's presence in the Honda.

A juror could reasonably have been convinced from the Commonwealth's proof that Smothers had been the principal actor in the harassment of Franklin, in which Hughes had joined, and that Smothers, at least as much as Hughes, did not want the police to find them in possession of the black Baretta pistol. Smothers's leading role in the confrontations with Franklin, the cousins' prior complicity or apparent cooperation, and the fact that Smothers shared Hughes's strong motivation to evade the police, made reasonable an inference that the complicity extended to the flight. The trial court did not err by so ruling.

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<sup>5</sup>Hodge v. Commonwealth, Ky., 17 S.W.3d 824 (2000); Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

<sup>6</sup>KRS 502.020(1)(a) and (b).

<sup>7</sup>*Cf.* Callahan v. Commonwealth, Ky., 508 S.W.2d 583 (1974) (presence at crime scene or mere association with principal offender does not establish aiding and abetting); Paul v. Commonwealth, Ky. App., 756 S.W.2d 24 (1988) (presence in back seat of car did not establish passenger's involvement with driver's drug activity).

Smother's testified in his own defense, and on cross-examination the Commonwealth's first question was, "You're a convicted felon, aren't you?" As Smother's counsel was objecting, Smother's responded that a case was pending. An ensuing bench conference revealed that Smother's had recently pled guilty to drug-possession and escape charges, but that sentencing and final judgment in that case had been continued pending the outcome of this one. The Commonwealth had been under the impression, it explained, that Smother's had been sentenced in the other case and that the judgment had become final. It volunteered to pursue the matter no further. The trial court ruled, however, that a duly entered guilty plea was a conviction for purposes of impeachment and that any witness who had pled guilty, even before final judgment had been entered on the plea, was subject to the sort of question the Commonwealth had asked. Despite this ruling, the Commonwealth let the question drop.

Counsel for Hughes picked it up. On re-cross-examination, in what proved to be the last question of the trial, he asked Smother's if he had "pled guilty to two felonies." Smother's, attempting to invoke his fifth-amendment right not to incriminate himself, refused to say more than that an unrelated case was pending. The trial court then read to the jury the standard admonition that the evidence of Smother's prior conviction was to have no bearing on this case beyond its effect on the juror's estimate of Smother's credibility. Smother's contends that the trial court erred by allowing him to be

impeached with a question about a guilty plea that was not yet final. We agree.

CR 43.07 and KRE 609 both provide for the impeachment of any witness by evidence that he or she "has been convicted of a felony."<sup>8</sup> Kentucky is among a minority of jurisdictions that construes "conviction" narrowly under these rules to mean "final judgment."<sup>9</sup> Because Smothers's guilty plea had not yet issued in a final judgment, the trial court erred by permitting him to be questioned about it.

We are persuaded in this instance, however, that the error could have had no bearing on the outcome of Smothers's trial and thus was harmless under RCr 9.24. As noted above, although Smothers denied any responsibility for fleeing from the police, there could be no dispute that the fleeing occurred and virtually no doubt that Smothers was a willing and active participant. And though Smothers denied having possessed a gun either that day or any day, Hughes confirmed Franklin's version of the confrontation and testified both that Smothers had thrown items from the car in the area where the gun and ammunition were found and that the gun Smothers had possessed was like the one turned over to the police. The gun's existence together with the

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<sup>8</sup>CR 43.07. KRE 609 authorizes impeachment by evidence that the witness "has been convicted of a crime . . . but only if the crime was punishable by death or by imprisonment for one (1) year or more. . . ."

<sup>9</sup>Commonwealth v. Duvall, Ky., 548 S.W.2d 832 (1977); Adkins v. Commonwealth, Ky., 309 S.W.2d 165 (1958); Tabor v. Commonwealth, Ky. App., 948 S.W.2d 569 (1997). See Annotation, *Permissibility of Impeaching Credibility of Witness by Showing Former Conviction, as Affected by Pendency of Appeal from Conviction or Motion for New Trial*, 16 ALR 3d 726 (1967); Annotation, *Permissibility of Impeaching Credibility of Witness by Showing Verdict of Guilty Without Judgment of Sentence Thereon*, 28 ALR 4<sup>th</sup> 647 (1984).



testimony of Franklin and Hughes is overwhelming evidence belying Smothers's vague and general denial. Finally, because Smothers received the minimum allowable total sentence, there is no probability that the improper impeachment unfairly prejudiced his sentencing. Accordingly, we affirm the March 21, 2000, judgment of the Fayette Circuit Court.

GUIDUGLI, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

SCHRODER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I would affirm the conviction for wanton endangerment but reverse the fleeing or evading a police officer as the defendant was not the operator of the vehicle.

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