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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000692-MR

JEREMY D. LAWTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CR-01496

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

NICKELL, JUDGE: This is a case of first impression regarding escape from a home incarceration program (HIP). In *Stroud v. Commonwealth,* 922 S.W.2d 382, 384 (Ky. 1996), the Supreme Court of Kentucky held "[v]iolation of the Home Incarceration Program **could** result in a second-degree escape."[1] (emphasis added).

[1] Kentucky Revised Statutes (KRS) 520.030, a Class D felony.

Jeremy D. Lawton questions whether unauthorized departure from a HIP could also result in a charge of third-degree escape.[2]

Lawton appeals from a final judgment and enhanced sentence of six years' imprisonment entered by the Fayette Circuit Court. A jury found him guilty of escape and being a persistent felony offender (PFO),[3] both in the second degree. On appeal he alleges the trial court erred by not instructing jurors on escape in the third degree as a lesser included offense, misstating the law in the second-degree escape instruction, and denying his motions for a directed verdict. The Commonwealth responds that there was no evidence to support an instruction on third-degree escape, Lawton waived any deficiencies in the wording of the second-degree escape instruction which were harmless at best, and the motions for a directed verdict were properly denied because the Commonwealth sufficiently proved all elements of escape in the second degree. After reviewing the law and the evidence, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In November of 2006, Lawton began serving a twelve-month sentence for criminal possession of a forged instrument in the third degree.[4] On July 26, 2007, the Fayette District Court placed him on home incarceration for the singular purpose of caring for his cancer-stricken mother in her home. Having been denied

[2] KRS 520.040, a Class B misdemeanor.

[3] KRS 532.080.

[4] KRS 516.070, a Class A misdemeanor.

work release, Lawton was allowed to take his mother to doctor appointments but was otherwise to remain inside her home. Lawton agreed to those terms and was fitted with an electronic monitoring device that was to be worn around his ankle at all times. On August 21, 2007, Lawton cut the ankle band, removed it from his ankle, and remained at large until October 2, 2007, when he was arrested. He was subsequently indicted for escape and being a PFO, both in the second degree.

The Commonwealth's trial theory[5] was just as alleged in the indictment—Lawton "committed the felony offense of Escape, Second Degree by escaping from the custody of the Fayette County Detention Center[.]" Trial commenced with the reading of a stipulation reached by Lawton and the Commonwealth stating that Lawton began serving a twelve-month sentence in the Fayette County Detention Center (FCDC) in November of 2006. Lawton's case worker, Corporal James Frazier, was the Commonwealth's sole witness. He testified: Lawton entered the HIP on July 26, 2007, pursuant to an order of the Fayette District Court; the terms of Lawton's HIP agreement did not permit work release; and while participating in the program, Lawton was still in FCDC custody although he was not physically within the confines of the FCDC. Corporal Frazier confirmed receiving an alert at approximately 9:14 p.m. on August 21, 2007,

[5] A defendant may commit the crime of escape in the second degree by: (1) escaping from a detention facility; (2) escaping from custody while charged with or convicted of a felony; or (3) willfully failing to stay within the limits of his confinement or failing to timely return to an institution or facility to which he was committed or transferred. *See Commonwealth v. Johnson,* 615 S.W.2d 1, (Ky.App. 1981); KRS 520.030(1); KRS 439.610; Ky. Prac. Substantive Crim. L. § 8:12 (2009-2010).

indicating the band on Lawton's electronic monitoring device was open. Attempts to contact Lawton that evening at his mother's home and by cell phone were unsuccessful. The next day, Corporal Frazier went to the home of Lawton's mother and retrieved the band that Lawton had cut from his ankle. Lawton was not in the home; he was ultimately arrested on October 2, 2007, and charged with second-degree escape.

At the close of the Commonwealth's case, Lawton moved for a directed verdict, arguing that his mother's home did not constitute a detention facility under KRS 520.010(4) and that his conduct did not satisfy the definition of escape under KRS 520.010(5). Citing *Stroud*, the Commonwealth argued second-degree escape was the appropriate charge and all elements of the crime had been proved. The Commonwealth also cited KRS 439.610, which states, "willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility to which he was committed or transferred to after commitment, constitutes an escape from custody punishable as provided in KRS 520.030." The trial court denied the directed verdict motion on the strength of *Stroud.*

Lawton's case consisted of testimony from himself, his mother, and his godfather/employer. On cross-examination, Lawton admitted being a convicted felon. At the Commonwealth's request, the court admonished jurors to consider Lawton's prior felony conviction only for its impact on his truthfulness and the weight of the evidence. Lawton also admitted he was in custody when he

cut the band on his monitoring device on August 21, 2007, and he did escape from custody, but disputed committing the offense of second-degree escape.

At the close of his case, Lawton renewed his motion for a directed verdict, again arguing his mother's home was not a detention facility. The court denied the motion, reiterating its prior finding that *Stroud* was dispositive and second-degree escape was the appropriate charge for his conduct.

In reviewing the court's proposed instructions, Lawton requested an instruction on third-degree escape as a lesser included offense of second-degree escape. He acknowledged *Stroud's* holding that "[v]iolation of the Home Incarceration Program could result in a second-degree escape[,]" but argued the opinion did not expressly foreclose the possibility that a violation of an electronic monitoring program could also result in a charge of third-degree escape. The seminal issue in *Stroud* was whether the defendant was in *custody*; there was no discussion of whether KRS 520.040 could also apply. The trial court did not instruct on escape in the third degree because it found no case law to support such an instruction.[6]

Jurors unanimously convicted Lawton of second-degree escape and being a second-degree PFO. The trial court sentenced Lawton in conformity with the jury's verdict—three years on the underlying offense of second-degree escape,

[6] Lawton admits in his brief that no case holds escape in the third degree is a lesser included offense of second-degree escape.

enhanced to six years by virtue of his status as a second-degree PFO. This appeal followed.

LEGAL ANALYSIS

We begin with Lawton's allegation that the trial court should have granted a directed verdict. "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. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill,* 660 S.W.2d 3, 4-5 (Ky. 1983)).

Second-degree escape, as charged in the indictment, required proof of escape from FCDC custody.[7] "Escape" is defined in KRS 520.010(5) as "departure from custody or the detention facility in which a person is held or detained when the departure is unpermitted, or failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period[.]" KRS 520.010(2) defines "custody" as "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes, but does not include supervision of probation or parole or constraint incidental to release on bail[.]" For purposes of this case, KRS 520.010(4)(a) defines a "detention facility" in relevant part as "any building and its

[7] Just like the defendant in *Stroud*, Lawton signed an agreement explaining the terms and conditions of his participation in the HIP. Therefore, like the defendant in *Stroud*, Lawton "waived any challenge to the custody imposed by the program by virtue of his participation therein." *Stroud*, 922 S.W.2d at 384.

premises used for the confinement of a person: (a) [c]harged with or convicted of an offense[.]"

Corporal Frazier testified that while participating in the HIP, Lawton remained in the custody of the FCDC even though he was not physically confined within the FCDC and an alert was received on August 21, 2007, indicating the monitoring device affixed to Lawton's ankle was open. These facts, in addition to the stipulation establishing Lawton was serving a twelve-month sentence imposed by the Fayette District Court, were sufficient to support a conviction for second-degree escape. Based upon the totality of the evidence and the holding of *Stroud,* we must conclude Lawton escaped from the custody of the FCDC and the trial court properly denied the requests for a directed verdict.

In affirming the denial of the directed verdict, we reject Lawton's argument that he was "released" from the FCDC to be placed on HIP. Lawton was "released" from the physical confines of the FCDC but he was not released from the actual custody of the FCDC. Saying Lawton was "released" was a poor choice of words by the prosecutor and Corporal Frazier, but it did not negate the sufficiency of the Commonwealth's proof of second-degree escape. Furthermore, Lawton himself testified he was still in custody when he cut the ankle band but offered no testimony from which jurors could have concluded he was restrained by a public servant or any entity other than the FCDC so as to trigger an instruction on third-degree escape.

Finally, because the Commonwealth was proceeding on the theory that Lawton had escaped from a detention facility (and not that he had escaped from custody while charged with or convicted of a felony, both of which are made criminal by KRS 520.030(1)) we reject Lawton's argument that the Commonwealth had to prove he escaped from custody *while charged with or convicted of a felony.* We find support for this conclusion in *Johnson, supra,* wherein a defendant charged with misdemeanors was out of jail on work release. In comparison, Lawton, serving twelve months for a misdemeanor, was out on home incarceration. In *Johnson,* the Commonwealth argued any escape from a detention facility should be prosecuted as a second-degree escape, and we agreed, holding that the trial court "erred in reducing the charge to a misdemeanor." The same result rings true in the case at bar. As written in *Johnson,* 615 S.W.2d at 1,

> Here we have a person who is an escapee by definition of KRS 520.010(5) from a detention facility without force or threat of force. Though it may be argued he is not a felon or is not charged with a felony and thus fits into the third category of custody alone, we are still confronted with the fact that his escape was not from custody alone but from a detention facility as is clearly designated in the second category.

Johnson does not deal with an escape from home incarceration, but its rationale is sound and leads us to the conclusion that the trial court did not err in denying the directed verdict.

Having established Lawton was properly convicted of second-degree escape, we turn our attention to whether the evidence also supported an instruction

on third-degree escape. A trial court must instruct jurors on the whole law of the case, including every theory "deducible or supported to any extent by the testimony." *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). There is no duty to instruct on a theory unsupported by the proof. *Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983). Further, an instruction on a lesser included offense is necessary "only if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Baker v. Commonwealth*, 103 S.W.3d 90, 94 (Ky. 2003). With these caveats in mind, we review for abuse of discretion the trial court's decision not to instruct jurors on third-degree escape. *Williams v. Commonwealth*, 178 S.W.3d 491, 498 (Ky. 2005).

Lawton claimed an instruction on escape in the third degree was necessary as a lesser included offense because all that must be proved for third-degree escape is a departure "from custody," and Lawton's testimony, as well as that of Corporal Frazier, established he was "in custody" when he severed and removed the ankle band. However, Corporal Frazier's testimony was not just that Lawton was in custody but that he was in the custody of the FCDC. Thus, it would have been unreasonable for jurors to convict Lawton of anything less than second-degree escape. Further, while it is true that third-degree escape requires proof of "custody," that term, as defined in KRS 520.010(2), requires proof of "restraint by a public servant," and there was no testimony that Lawton was in anyone's custody

but that of the FCDC. Therefore, we are convinced no abuse of discretion occurred.

Lawton's final argument is that the second-degree escape instruction given by the trial court misstated the law. Lawton admits this argument is unpreserved and requests palpable error review under RCr[8] 10.26. We may review an unpreserved error under this rule only if Lawton's substantial rights were affected, and we may grant relief only if the error resulted in manifest injustice.

Lawton argues he could be convicted of second-degree escape only if the Commonwealth proved he was *charged with or convicted of a felony* at the time he cut and removed the ankle band. We disagree. Second-degree escape may be established by proving an escape from a detention facility or by proving an escape from custody while one is charged with or convicted of a felony. KRS 520.030(1). There is no requirement, as Lawton argues, that the Commonwealth prove an escape from a detention facility while the defendant was charged with or convicted of a felony. Within the statute, the phrase —"being charged with or convicted of a felony"— modifies only "escapes from custody." Otherwise, double use of the word "*escape*" would be redundant. Moreover, inclusion of the phrase, "[t]hat at the time of his escape the Defendant was serving a twelve (12) month sentence," in the instruction was consistent with establishing Lawton escaped from a "detention facility" as defined in KRS 520.010(4). Thus, we see no error in the wording of the instruction on second-degree escape.

[8] Kentucky Rules of Criminal Procedure.

Under the facts of this case, there was no basis for an instruction on the offense of escape in the third degree. For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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