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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-001485-MR

SHELBY CAUDILL — APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 08-CR-00028

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND MOORE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

NICKELL, JUDGE: Shelby Caudill was convicted following a jury trial in the Fleming Circuit Court on charges of fleeing or evading police in the first degree,[2]

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] KRS 520.095, a Class D felony.

harassment,[3] resisting arrest,[4] and being a persistent felony offender in the first degree[5] (PFO I). He received a sentence of five years' imprisonment for the fleeing charge, enhanced to fifteen years by virtue of the PFO I charge.[6] He now appeals his conviction as a matter of right and we affirm.

On March 7, 2008, Shelby was indicted by a Fleming County Grand Jury for fleeing or evading police in the first degree, assault in the fourth degree,[7] resisting arrest, and PFO I. At a jury trial held on June 9, 2008, the evidence established that Shelby and his wife, Debbie Caudill, were drinking heavily at their home in Fleming County, Kentucky, on February 16, 2008, when they got into a verbal disagreement. During the argument, Shelby shoved Debbie, causing her to stumble backwards. Debbie, who had recently undergone a heart catheterization procedure, began to experience chest pains. Her daughter from a previous marriage witnessed all of the incidents and, being scared for her mother's health, called 911. Shelby began "freaking out" that the police would come to the residence.

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[3] KRS 525.070, a Class B misdemeanor.

[4] KRS 520.090, a Class A misdemeanor.

[5] KRS 532.080.

[6] Caudill received sentences of ninety days in jail and a $250.00 fine for harassment and twelve months in jail and a $500.00 fine for resisting arrest. These misdemeanor jail terms were ordered to run concurrently with the felony sentence in accordance with statutory mandates.

[7] KRS 508.030, a Class A misdemeanor.

Shortly thereafter, members of the Hillsboro Fire Department and Fleming County EMS arrived at the home. The rescue workers refused to enter the residence until law enforcement arrived as Shelby informed them they needed a warrant to enter. Two deputies from the Fleming County Sheriff's Office arrived and were let into the residence by Debbie's daughter. They noticed Shelby had a bloody lip, was sweating, looked as though he had been crying, and was obviously inebriated. The deputies directed him to sit on the couch while they assessed the situation. Debbie informed the deputies her chest was hurting and she believed it was her heart. She further informed them she and Shelby had been arguing and that Shelby had shoved her with two hands. As the deputies were speaking with Debbie's daughter about the events of the evening, Shelby got up from the couch and fled from the residence. Both deputies gave chase and several verbal commands for Shelby to stop were ignored.

During the foot pursuit, Shelby ran down a steep embankment behind the residence followed closely by one of the deputies. Shelby crashed through trees and underbrush in his attempt to elude capture, but eventually tripped on a stump allowing the pursuing deputy to catch up and get one handcuff on him. Shelby rolled, kicked, and screamed to avoid being placed in restraints. Shortly thereafter, the other deputy, accompanied by some of the rescue workers, arrived to assist in bringing Shelby under control. Even with this additional manpower, it took time to subdue him. Ultimately, Shelby was placed in the back of a police cruiser where he proceeded to bang his head against the cage and side window and

kicked at the door. Following Shelby's arrest, Debbie reiterated her earlier story to the officers that Shelby had shoved her during their argument, but insisted her chest pains were the only result and she received no other injury from the push.

The jury found Shelby guilty of fleeing or evading police in the first degree, resisting arrest, and harassment—a lesser-included offense of assault in the fourth degree. His punishment was fixed at five years' imprisonment on the felony conviction, twelve months and a $500.00 fine for resisting arrest, and ninety days and a $250.00 fine for harassment. The jury subsequently found Shelby to be a PFO I and enhanced the felony sentence to fifteen years' imprisonment. The trial court sentenced Shelby in accordance with the jury's recommendation on July 2, 2008. This appeal followed.

Shelby contends the trial court erred in failing to merge the charge of fleeing or evading police into the resisting arrest charge. He argues this failure violated the proscription on double jeopardy as the two crimes arose out of the same course of conduct. Next, Shelby alleges the trial court erred in failing to grant his motion for a directed verdict on the assault charge. Finally, he contends the fifteen year sentence he received was grossly disproportionate to the events which occurred. We disagree and affirm the Fleming Circuit Court.

First, Shelby argues the fleeing or evading charge and the resisting arrest charge stemmed from the same course of conduct and the trial court's failure to merge these two counts constituted a violation of the proscription on double jeopardy. Although he claims this allegation was properly preserved for appellate

review, we find no support for this claim in the record. However, our Supreme Court has held "double jeopardy claims fall under the palpable error rule because this Court does not want to let stand a conviction possibly tainted by double jeopardy." *Cardine v. Commonwealth*, 283 S.W.3d 641, 651 (Ky. 2009) (internal quotation marks and brackets omitted). Thus, reversal is mandated only if manifest injustice results from the error. RCr[8] 10.26. To prove such injustice has occurred, the Supreme Court has stated "that the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Reviewing courts are to "plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Id*. at 4.

A violation of the proscription on double jeopardy "does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Commonwealth v. Burge,* 947 S.W.2d 805, 809 (Ky. 1996) (quoting and readopting *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), as the appropriate test). *See also* KRS 505.020(1) ("When a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense."). This test is used to assess the charging of two different crimes for the same course of conduct. The analysis

[8] Kentucky Rules of Criminal Procedure.

focuses "only on whether each statute, on its face, contains a different element." *Dixon v. Commonwealth*, 263 S.W.3d 583, 591 (Ky. 2008).

The two statutes at issue in the instant matter clearly require proof of different elements. To be charged with fleeing or evading of police in the first degree under KRS 520.095(1)(b), one must flee immediately after committing an act of domestic violence. Resisting arrest contains no such element. Likewise, a police officer's verbal command to stop must be disobeyed to charge one with fleeing or evading but resisting arrest contains no such requirement. In contrast, resisting arrest requires proof of the use or threat of force or otherwise creating a substantial risk of causing physical injury meant to impede a police officer from effectuating an arrest. Fleeing or evading contains no such similar requirement. Thus, on their face, the two statutes clearly contain different elements and no double jeopardy violation occurred. *Id*.

Next, Shelby argues the trial court erred in denying his motion for a directed verdict on the assault charge. He contends the Commonwealth failed to prove Debbie sustained any physical injury thus completely precluding a conviction for assault. He further contends the trial court should have granted him a directed verdict on the lesser-included offense of harassment. We disagree.

> On a motion for a directed verdict, a trial court is required to
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> 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.
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> 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 (Ky. 1983)). A reviewing court is not permitted to "reevaluate the evidence or substitute its judgment as to the credibility of a witness for that of the trial court and the jury." *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994) (quoting *Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987)).

We first note that Shelby did not move for a directed verdict of acquittal on the harassment charge. He raises this argument for the first time on appeal. It is well-settled that a trial court must be given an opportunity to rule and a defendant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Thus, we decline to further discuss this allegation of error.

At a bench conference discussing Shelby's motion for a directed verdict on the assault charge, the trial court indicated it believed that the Commonwealth had presented more than the scintilla of evidence required to overcome the motion. Although the court believed the evidence might have been weak, it believed it would be reasonable for a jury to find guilt. We agree. The

Commonwealth presented uncontroverted evidence that there was a physical touching[9] initiated by Shelby that resulted in Debbie almost immediately having chest pains. The Commonwealth further presented testimony that Shelby was aware of Debbie's heart condition and that she had only recently undergone a heart catheterization procedure. Thus, we believe the Commonwealth carried its burden sufficiently to overcome a motion for directed verdict on the assault charge as the trial court found.

Finally, Shelby argues the sentence he received was grossly disproportionate to the events that transpired. He contends his sentence is so excessive it violates the prohibition against cruel and unusual punishments contained in the Eighth Amendment to the United States Constitution.[10] *See Solem v. Helm*, 463 U.S. 277, 288, 303, 103 S.Ct. 3001, 3008, 3016, 77 L.Ed.2d 637 (1983) (Eighth Amendment prohibits extreme sentences that are grossly disproportionate to the crime committed). *See also Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). Shelby admits this issue is unpreserved for review, but requests relief under the palpable error standard. We perceive no such error.

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[9] Conflicting testimony was given on the issue of whether Shelby shoved or bumped Debbie. However, the testimony was consistent that Shelby's actions caused Debbie to stumble backwards following the contact.

[10] The Constitution of Kentucky contains a similar prohibition. However, the proscription contained therein is against "cruel punishment" rather than "cruel and unusual punishments." Our Supreme Court has held this to be "a distinction without a difference." *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003).

Shelby was convicted by a jury of his peers of the offense of fleeing or evading police, a Class D felony, and was sentenced to the statutory maximum term of five years' imprisonment. *See* KRS 532.060. He was also sentenced as a PFO I, which means the jury could have sentenced him to anywhere between ten and twenty years' imprisonment. *See* KRS 532.080. The jury chose fifteen years.

During the PFO stage, the jury heard of Shelby's previous felony convictions for burglary and criminal mischief. Possibly because his record was not extreme in the eyes of the jurors, they fixed his sentence in the middle of the permissible penalty range. That decision was reasonable under the facts of this case. The PFO statutes were designed by the legislature to lengthen the period of incarceration for those with a criminal history. It is axiomatic that states are justified in sentencing repeat offenders more harshly than first-time offenders. *Solem*, 463 U.S. at 296, 103 S.Ct. at 3013. Thus, as the jury's sentencing recommendation was within the applicable penalty range, Shelby's sentence is not grossly disproportionate to the crimes he committed. *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) ("if the punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence."). No error occurred.

Therefore, for the foregoing reasons, the judgment of the Fleming Circuit Court is affirmed.

ALL CONCUR.

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