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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002295-MR

BENJAMIN WAYNE CARTER

APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 09-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Benjamin Wayne Carter appeals from the final judgment of the Allen Circuit Court sentencing him to two years' imprisonment and imposing a \$100 fine (converted to time served). For the following reasons, we affirm.

Carter was indicted on charges of fleeing and evading police in the first degree, wanton endangerment in the first degree (two counts), reckless driving and speeding after he failed to adhere to a state trooper's attempt to stop his vehicle for a speeding violation. The trial commenced on November 19, 2009, and fourteen jurors were sworn in, duly admonished by the court, and then recessed for lunch. During the recess, a juror approached the bench, informed the court that she had previously worked for the defense counsel, held defense counsel in high regard, and felt she could no longer remain impartial. The court excused her for cause and Carter moved for a mistrial, which was denied.

After the lunch recess, the court asked the jury whether any juror during voir dire had expressed an opinion about any of the attorneys to any of the remaining jurors. One juror claimed her husband, who had been excused from the panel, had spoken to her about the attorneys. The court again asked whether any juror had a conversation about the attorneys, and no one else indicated that they had. In chambers, the juror stated that her husband told her he would want to be excused because of his feelings toward defense counsel. Carter moved to strike the juror for cause, which the court granted. Carter then moved for a mistrial, which the court denied. The trial proceeded with the remaining twelve jurors.

During trial, State Trooper Adam Morgan testified that he attempted to pull over a vehicle which he registered traveling 81 m.p.h. in a 55 m.p.h. speed zone. The vehicle did not stop, and a chase ensued. Trooper Morgan testified that as he pulled alongside the vehicle he was able to identify the driver as Carter.

Trooper Morgan stated the chase occurred during daylight and neither vehicle had activated their headlights. During cross-examination of Trooper Morgan, Carter attempted to introduce as evidence a document from the naval observatory that detailed the time of sunset on the day of the arrest to impeach Trooper Morgan's testimony that the chase occurred during daylight hours. The Commonwealth objected to the introduction of the evidence, based on lack of foundation, and the trial court sustained the objection on the basis that Trooper Morgan, as a lay witness, could not authenticate the document, testify from the document, or interpret the document. Carter then attempted to introduce the document by avowal, and requested to testify from it. Again, the Commonwealth objected, emphasizing that the document was not provided during discovery, and differing interpretations exist amongst laypersons as to what constitutes a sunset. The court sustained the Commonwealth's objection on the basis that a lay witness' interpretation of the document's meaning would be speculative.

Further, the court rejected Carter's proposed jury instruction which included wanton endangerment in the second degree, menacing, reckless driving, and speeding as lesser included offenses to the charge of wanton endangerment in the first degree, and resisting arrest as a lesser included offense to the charge of fleeing and evading in the first degree.

Carter was found guilty of fleeing and evading in the first degree, two counts of wanton endangerment in the second degree, and speeding. The court set aside both counts of wanton endangerment and sentenced Carter to two years'

imprisonment on the fleeing and evading in the first degree conviction and a \$100 fine on the speeding conviction (converted to time served). This appeal followed.

Carter first argues the trial court erred by not admitting the naval observatory document into evidence and thereby deprived him of a meaningful opportunity to cross-examine Trooper Morgan. We disagree.

The standard for reviewing a trial court's decision on the admission of evidence is whether the trial court abused its discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted). The trial court abused its discretion if the "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citations omitted).

Carter argues the naval observatory document was admissible without additional foundation under KRE¹ 902 which provides: "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (5) ***Official publications***. Books, pamphlets, or other publications purporting to be issued by public authority."

In this case, Carter sought to introduce the naval observatory document as evidence that the chase and arrest did not occur during daylight hours, based upon the time of sunset recorded by the United States Naval Observatory. The Commonwealth argued, and the trial court agreed, that the report was not sufficiently reliable because different interpretations exist as to what constitutes a sunset, specifically the amount of natural light which remains after a sunset.

¹ Kentucky Rules of Evidence.

Indeed, the record contains definitions provided by the United States Naval Observatory stating that some illumination from natural light occurs after a sunset. Under these circumstances, the trial court acted within its discretion by not admitting the naval observatory document as evidence. *See* KRE 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury[.]”).

Next, Carter argues the trial court erred by not instructing the jury on a charge of resisting arrest as a lesser included offense to the charge of fleeing and evading in the first degree.² We disagree.

Generally, “[a]lleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review.” *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky.App. 2006) (citation omitted).

Under Kentucky law, “[a]n instruction on a lesser included offense is required 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.” *Commonwealth v. Day*, 983 S.W.2d 505, 509 (Ky. 1999) (citations omitted). An offense is considered a

² Additionally, Carter argues the trial court erred by failing to instruct the jury on menacing, reckless driving, and speeding as lesser included offenses of wanton endangerment in the first degree. However, the record indicates the trial court set aside both of Carter’s convictions for wanton endangerment in the first degree. Therefore, this claim of error is moot.

lesser included offense if it “includes the same or fewer elements than the primary offense.” *Id.*

KRS³ 520.095 provides, in relevant part:

(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 organized to be a police officer, and at least one of the following conditions exists:

1. The person is fleeing immediately after committing an act of domestic violence as defined in KRS 403.720;
2. The person is driving under the influence of alcohol or any other substance or combination of substances in violation of KRS 189A.010;
3. The person is driving while his or her driver’s license is suspended for violating KRS 189A.010; or
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 520.090 provides, in part:

(1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

³ Kentucky Revised Statutes.

(b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

Our review of the statutes reveals that the two crimes each require proof of different elements. Resisting arrest requires the defendant to create a substantial risk of causing physical injury to a peace officer or another person, while preventing a peace officer from affecting an arrest. Fleeing or evading in the first degree requires the defendant to disobey a direction to stop given by a police officer, who does not need to be effecting an arrest. Since the two crimes require proof of different elements, resisting arrest is not required as a lesser included offense of fleeing and evading in the first degree. Accordingly, the trial court did not err by not instructing the jury to that effect.

Finally, Carter argues the trial court erred by denying both of his motions for a mistrial when two jurors were struck for cause after being sworn in by the court. Specifically, Carter contends because the jurors were already sworn in before being struck for cause, they had an opportunity to taint the jury and create the impression of impropriety. Additionally, Carter argues because the jurors were struck after he had exercised his peremptory challenges, he was effectively precluded from using his challenges to achieve his desired demographic for the jury. We disagree.

The record indicates after the first juror brought to the attention of the court her inability to remain impartial due to her prior employment relationship with defense counsel, the court questioned the remaining jury members whether

any juror had expressed opinions about the attorneys. When a second jury member answered in the affirmative, the court removed that juror to chambers, and again asked the remaining twelve jurors whether any of them had discussed the attorneys, and none responded that they had. Thus, no evidence indicates that the jury was tainted by these two jurors. Furthermore, Carter fails to cite to any authority entitling him to a certain demographic for the jury. Accordingly, we find the trial court did not err by denying Carter's motions for a mistrial.

The judgment of the Allen Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David F. Broderick
Jason C. Hays
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky