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RENDERED: AUGUST 29, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000180-MR

MICHAEL KIDD — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 11-CR-00324

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Michael Kidd appeals as a matter of right, Ky. Const. § 110, from a judgment entered by the Kenton Circuit Court convicting him of first-degree robbery, first-degree fleeing or evading police, and of being a first-degree persistent felony offender. He was sentenced to twelve years for the robbery conviction and one year for the fleeing or evading conviction, with those sentences enhanced to twenty-five and ten years, respectively, by his conviction as a persistent felony offender. The sentences were ordered to be served consecutively in part and concurrently in part for a total sentence of thirty-two years.

On appeal, Appellant raises the following grounds for relief: (1) the trial court erred by failing to grant his motion for a directed verdict on the first-degree robbery charge; (2) the trial court erred by failing to grant his motion for a directed verdict on the first-degree fleeing or evading charge; (3) the trial

court erred by permitting the prosecutor to introduce excessive and redundant video and photographic evidence; (4) the sentences are so disproportionate to his crimes that his total sentence violates the Eighth Amendment; and (5) the trial court erred by denying his motion to excuse a juror after the commencement of the trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

On her way home from work early in the evening, Mary Bruenemann stopped at a grocery store in Erlanger, Kentucky. The Commonwealth's evidence established that she finished her shopping and, as she put her groceries into her vehicle, Appellant confronted her, threatened her with a knife, and demanded that she surrender her purse and the keys to her car. She complied and Appellant fled with her car and wallet.

The incident was promptly reported to 911, and the dispatcher notified police officers in the vicinity. Officer Miles drove to a location where he thought he might intercept the vehicle, and shortly thereafter Bruenemann's car, driven by Appellant, appeared. Miles pursued the vehicle and activated his emergency lights and siren. Instead of stopping immediately, Appellant led Officer Miles on a short chase during which he cut across lanes of traffic, forcing oncoming vehicles to the shoulder of the road so he could pass. Eventually Appellant stopped the vehicle, but he then attempted to flee on foot. Miles continued the chase on foot, and soon apprehended and arrested Appellant. At the time of his arrest, Appellant was still in possession of the victim's credit cards and cell

phone. A knife was found in the vehicle and Bruenemann testified that it was not in her car before Appellant took her keys.

At the scene of the arrest, police officers accused Appellant of robbing the victim at knife point and he replied, "I didn't hold a knife to nobody." Later, during an interrogation at the police department, Appellant admitted to taking the vehicle but he again insisted that he had no weapon when he commanded the victim to relinquish her car keys.

As a result of the foregoing events, Appellant was indicted for first-degree robbery, first-degree fleeing or evading police, and of being a first-degree persistent felony offender. The case was tried before a jury. Appellant was convicted on all charges and sentenced to a total of thirty-two years' imprisonment. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE – ROBBERY

Appellant contends that he was entitled to a directed verdict on the first-degree robbery charge because the evidence did not sufficiently establish that, when he stole the victim's car and wallet, he was armed with a deadly weapon or that he used or threatened to use a dangerous instrument.

The first-degree robbery statute, KRS 515.020, provides as follows:

> (1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or

(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

There was no suggestion in the evidence that Appellant caused physical injury to the victim, and Appellant does not challenge the adequacy of the evidence indicating that he stole the vehicle and wallet. The issue Appellant asserts is whether the Commonwealth met its burden of proving that, at the time of the theft of Bruenemann's property, he was either armed with a deadly weapon or that he used or threatened to use a dangerous instrument against the victim. Holding a knife to the victim would satisfy this contested element of the crime. *See* KRS 500.080(4)(c) (defining deadly weapon as "Any knife other than an ordinary pocket knife or hunting knife[.]"); KRS 500.080(3) (defining dangerous instrument as "any instrument, . . . article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury[.]").

When ruling on a motion for directed verdict, "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). A directed verdict is not proper when "the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty[.]" *Id.* On appeal, "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." *Id.* (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4-5 (Ky. 1983)).

Appellant contends that the Commonwealth failed to prove the deadly weapon/dangerous instrument element of the crime because he denied upon his arrest and again upon police interrogation that he had brandished a knife to the victim, and because the image captured by the grocery store surveillance camera just before the incident disclosed nothing was in Appellant's hands.

Other evidence, however, establishes that Appellant had a weapon. Specifically, the victim testified that Appellant held a knife to her; a store clerk on duty at the time testified that immediately after the event, the victim exclaimed that a man with a knife had robbed her; and, finally, a knife not belonging to the victim was found in her car immediately after Appellant got out of the vehicle. For purposes of our review, the testimony of the victim and the store clerk must be accepted as true. The weight and credibility of that evidence is a question reserved for the jury. *Benham*, 816 S.W.2d at 187. It would not have been unreasonable for a jury to believe the victim's testimony and conclude that Appellant possessed the knife, a deadly weapon, during his

theft of the car and wallet. Appellant was not entitled to a directed verdict on the first-degree robbery charge.[1]

III. SUFFICIENCY OF THE EVIDENCE – FLEEING OR EVADING

Appellant next contends that he was entitled to a directed verdict on the first-degree fleeing or evading charge because the Commonwealth failed to establish that, during his flight from Officer Miles, he created a substantial risk of serious physical injury or death to any person or property.

KRS 520.095 provides in pertinent 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 recognized to be a police officer, and at least one (1) of the following conditions exists:
>
> . . .
>
> 4. By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property[.]

[1] Based upon the arguments made at trial and in his brief, Appellant's argument could be construed as a request for a "directed verdict" upon the indicted charge with the understanding that he would remain subject to instructions upon lesser-included offenses, rather than as a request for a total acquittal. If so, it would be an independent basis for upholding the trial court's denial of a directed verdict on the first-degree robbery charge. A directed verdict is only proper when the defendant is entitled to *a complete acquittal. Trowel v. Commonwealth*, 550 S.W.2d 530, 531 n.1 (Ky. 1977) (A motion for directed verdict is an improper procedural means for obtaining any relief short of complete acquittal.). If Appellant is conceding that he would still be subject to conviction for a lesser-included offense, such as second-degree robbery or theft, the issue is more appropriately analyzed as whether the trial court erred by giving an instruction on the indicted offense. *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977) ("When the evidence is insufficient to sustain the burden of proof on one or more, but less than all, of the issues presented by the case, the correct procedure is to object to the giving of instructions on those particular issues."); *Acosta v. Commonwealth*, 391 S.W.3d 809, 818 (Ky. 2013).

"Whether a defendant's act of fleeing or eluding police creates 'a substantial risk of death or serious physical injury' will, of course, 'turn [ ] on the unique circumstances of an individual case.'" *Bell v. Commonwealth*, 122 S.W.3d 490, 497 (Ky. 2003) (quoting *Cooper v. Commonwealth*, 569 S.W.2d 668, 671 (Ky. 1978)).

In support of this argument, Appellant argues that there was insufficient proof that his actions created a substantial risk of serious physical injury or property damage as required by KRS 520.095(1)(a)(4). However, there was considerable testimony presented which established that, during the car chase, Appellant drove at excessive speeds in a reckless and dangerous manner, that he veered unsafely across lanes of traffic, and that, as a result of Appellant's dangerous driving, other drivers were forced to pull off the road in order to avoid a possible collision. Viewing the evidence in the light most favorable to the Commonwealth, we must conclude that Appellant's conduct created a substantial risk of serious physical injury or property damage. The trial court properly denied his motion for a directed verdict on the fleeing or evading charge.

IV. VIDEO AND PHOTOGRAPHIC EVIDENCE

Appellant next contends that the trial court abused its discretion by permitting the Commonwealth to engage in "prosecutorial overkill" by introducing redundant video and photographic evidence of the events at the grocery store. The evidence Appellant challenges is the Commonwealth's

introduction of two segments of video from the grocery store's security cameras and a total of thirty photographic images excerpted from the two videos. Appellant contends that the evidence was repetitive and that it created the misperception that the robbery, which lasted a mere fifteen seconds, was a more protracted, more enduring, and a more significant event.

As with the admission of other types of evidence, we review the trial court's decision concerning the admission of photographs pursuant to the abuse of discretion standard. *See Greene v. Commonwealth*, 197 S.W.3d 76, 86 (Ky. 2006); s*ee also Ernst v. Commonwealth*, 160 S.W.3d 744, 757 (Ky. 2005) (applying the abuse of discretion standard to the admission of crime scene photographs).

To be admitted at trial, the evidence must be relevant. KRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. However, even 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, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403; *Moorman v. Commonwealth*, 325 S.W.3d 325, 332–33 (Ky. 2010).

Here, the store's outdoor video camera captured Appellant approaching the store and sitting on a bench, and then leaving the bench to perpetrate the robbery. Video images from a camera inside the store depicted the victim's

animated entrance immediately after the robbery. Because the two cameras captured relevant events that occurred both outside and inside the store immediately before and after the alleged robbery, the evidence was highly probative. Further, the video segments were very brief and the action depicted in them was very fast. Therefore, the thirty still images extracted from them enabled the jury to more ably determine what occurred. We are not persuaded that the trial court abused its discretion by permitting the admission of the two videos segments and the thirty still images derived from them.

Even if the Commonwealth could have achieved its purpose with fewer than thirty still photographs, the cumulative evidence thus admitted was harmless. *See Torrence v. Commonwealth*, 269 S.W.3d 842, 846 (Ky. 2008). We can conclude with fair assurance that any error in the admission of an excessive number of photographs did not substantially sway the verdict. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009).

V. PROPORTIONALITY OF SENTENCE

Appellant next contends that the thirty-two year total sentence imposed in this case was so disproportionate to the crimes as to violate the Eighth Amendment prohibition against cruel and unusual punishment.

In *Turpin v. Commonwealth*, we recognized that the Supreme Court of the United States has explained that the Eighth Amendment "prohibits not only barbaric punishments such as torture, but also punishments disproportionate to the crime." 350 S.W.3d 444, 447 (Ky. 2011) (citing *Graham v. Florida*, 560

U.S. 48, 130 S. Ct. 2011, 2021 (2010)). This "proportionality principle," the Supreme Court cautioned, is narrow and "'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are grossly disproportionate to the crime.'" *Graham*, 130 S. Ct. at 2021 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–01 (2010)); *see also Weems v. United States*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense."). In determining whether this principle has been breached in a particular case:

> [A] court must begin by comparing the gravity of the offense and the severity of the sentence. "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Graham, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005) (citations omitted); *see also Turpin*, 350 S.W.3d at 447-49 (A sentence of twenty years' imprisonment for possession of a firearm by a convicted felon, as a first-degree persistent felony offender, was not excessive, even though defendant's prior felony convictions were non-violent offenses.).

We have observed that "proportionality review has never (or hardly ever) been used to strike down a mere prison sentence." *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984) (citing *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)); *see also Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) ("[I]f

the punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence.").

Upon application of the above principles, we conclude that Appellant's enhanced sentence of thirty-two years for first-degree robbery, first-degree fleeing or evading, and of being a first-degree persistent felony offender is simply not such an extreme sentence as to constitute cruel or unusual punishment. First-degree robbery and first-degree fleeing or evading are far from petty crimes, and a thirty-two year sentence for the conduct involved, particularly in light of Appellant's prior felony convictions, invokes no sense of fundamental unfairness.

VI. FAILURE TO EXCUSE JUROR

During the testimony of a prosecution witness, defense counsel approached the trial judge and expressed his concern that one of the jurors was falling asleep. Again, after a small amount of time passed, defense counsel approached the bench and complained that the juror was sleeping. A short time later, after observing that the juror still appeared to be falling asleep, the trial court *sua sponte* called the attorneys to the bench and asked if they wanted him to privately examine the juror regarding the issue. The judge made clear that he would excuse the juror *if* she was sleeping.

Following his *in camera* examination of the juror, the trial judge reported to the attorneys that the reason the juror was closing her eyes was because she was suffering from eye sensitivity to the lighting in the courtroom. The trial

judge quoted the juror as stating "I've been paying attention, I've been taking notes, it may look like I'm closing my eyes, but I'm doing it . . . just 'cause my eyes are sensitive to the [light]." Nevertheless, defense counsel requested that the juror be excused, to which the judge responded, "You have no grounds to, if the woman testifies or has told me, assures me that she's been paying attention, taking notes . . . I just don't see any grounds to excuse her based upon my *voir dire* of her." The judge further offered to permit defense counsel to *voir dire* the juror.

The next day the issue again arose and the juror was brought out for a bench conference. Upon being asked by the trial judge if she was sleeping, the juror responded, "No. No, it's the lights, my eyes are real sensitive to fluorescent lights. And so I blink them a lot and sometimes I want to close them down because it burns. I got eye drops with me today." When asked if she felt like she could not do the job she responded, "No, no, I'm fine." Following this discussion, Appellant did not renew his motion to excuse the juror.

"[A] juror's inattentiveness is a form of juror misconduct, which may prejudice the defendant and require the granting of a new trial." *Lester v. Commonwealth*, 132 S.W.3d 857, 862 (Ky. 2004). However, "[t]he trial judge is in the best position to determine the nature of alleged juror misconduct and the appropriate remedies for any demonstrated misconduct." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 276 (Ky. 2006) (quoting *United States v. Sherrill*, 388 F.3d 535, 537 (6th Cir. 2004)).

Based upon the explanation given by the juror that she was closing her eyes merely because of her sensitivity to the courtroom lighting, and her further representation that she was not sleeping but, rather, was paying attention and taking notes, the trial court did not abuse its discretion by permitting the juror to continue her service on the jury.

VII. CONCLUSION

Finding no error among the issues raised by Appellant, we affirm the judgment of the Kenton Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Katie L. Benward
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Christian Kenneth Ray Miller
Assistant Attorney General