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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000266-MR

TRAVIS D. CRAYTON — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA JEAN ECKERLE, JUDGE
NO. 11-CR-002663

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

At around 5 a.m., on the morning of August 18, 2011, in Louisville, Kentucky, Appellant, Travis D. Crayton, robbed David May at gunpoint. Officer Daniel Lewis of the Louisville Metro Police Department was the first to respond. From his cruiser, Officer Lewis observed Crayton on foot nearby. He was counting money. After recognizing that Crayton matched the description of the robbery suspect, Officer Lewis pulled his cruiser next to Crayton and ordered him over. Crayton initially complied by approaching the cruiser and placing his hands behind his head. However, Crayton ran away as Officer Lewis was exiting the cruiser.

Officer Michael Pawul was nearby and responded to the radio call regarding a foot pursuit of an armed robbery suspect. Officer Pawul believed

the suspect would attempt to evade the officers by cutting between two schools, Olmstead Academy South and Iroquois High School. Accordingly, he pulled his cruiser into a parking lot between the schools where he observed a figure crouched down and hiding near the baseball field behind the high school. It was still dark outside when Officer Pawul approached the figure with his side arm and flashlight drawn.

Officer Pawul approached the concrete scorer's building behind which Crayton was hiding and announced himself as a police officer. Crayton then emerged from the shadows with his right hand in his pocket, prompting Officer Pawul to order Crayton to show his hands. Crayton refused and darted behind the scorer's building. Hearing a chain link fence rattle and believing Crayton had escaped from his current position, the officer rounded the corner of the scorer's building only to discover Crayton pointing a pistol at him. He began to step back when Crayton shot at him, narrowly missing his head. Officer Pawul fell to the ground and Crayton fired a second shot, narrowly missing the officer's legs. Pawul returned fire and crawled towards cover. Crayton then climbed over a chain-link fence and fled. While running away, Crayton fired two random shots over his shoulder in the direction of Officer Pawul. Officer Pawul once again returned fire, but Crayton managed to successfully flee to a nearby residential neighborhood. At that point, the foot pursuit was terminated.

Policeman Allan Elder, who was already searching in the area, eventually located Crayton hiding underneath the wooden deck of a nearby house. He

and other officers surrounded the back yard and ordered Crayton to get on the ground and show his hands, but he refused. Still presuming Crayton to be armed, Officer Elder tased him and then took him into custody.

After searching the back yard, officers discovered the .38 caliber revolver used to shoot at Officer Pawul. This weapon was found near the fence line on the opposite side of the wooden deck from where Crayton had been hiding. The revolver contained one live round but no shell casings. Crayton later admitted to throwing down the pistol in the back yard while being pursued by police officers.

Crayton was indicted by a Jefferson County grand jury on charges of attempted murder; first-degree robbery; first-degree fleeing or evading the police; tampering with physical evidence; and resisting arrest. A Jefferson Circuit Court jury found Crayton guilty of the lesser-included offense of attempted first-degree assault; first-degree robbery; first-degree fleeing or evading the police; tampering with physical evidence; and resisting arrest. The jury recommended a total sentence of twenty years imprisonment and the trial court sentenced Crayton in accord with this recommendation. Crayton now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Two issues are raised and addressed as follows.

Directed Verdict

Crayton asserts that the trial court erred in denying his motion for a directed verdict of acquittal for the offense of first-degree fleeing or evading the police and tampering with physical evidence. We will reverse the trial court's

denial of a motion for directed verdict "if under the evidence as a whole, it would be *clearly unreasonable* for a jury to find guilt[.]" *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky. 1983) (emphasis added)). Our review is confined to the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth,* 354 S.W.3d 565, 575 (Ky. 2011).

Fleeing or Evading the Police in the First Degree

KRS 520.095 provides in pertinent part as follows:

> (1) A person is guilty of fleeing or evading police in the first degree:
>
> . . .
>
> (b) When, as a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys an order to stop, given by a person recognized to be a peace officer, and at least one (1) of the following conditions exists:
>
> 1. The person is fleeing immediately after committing an act of domestic violence as defined in KRS 403.720; or
>
> 2. By fleeing or eluding, the person is the cause of, or creates a substantial risk of, serious physical injury or death to any person or property.

Crayton was convicted under subsection (b)(2). It is undisputed that Crayton intentionally fled on foot from a known police officer and that he disobeyed a command to stop. However, Crayton submits that the Commonwealth failed to prove that his act of fleeing or eluding caused or created a substantial risk of serious physical injury or death to any person or serious injury to any property and, therefore, he was entitled to a directed verdict of acquittal at trial. We disagree.

In *Bell v. Commonwealth*, the Court reversed the trial court's denial of a directed verdict and held that the defendant's possession and/or discarding of a loaded handgun during a foot chase failed to create a substantial risk of serious physical injury or death as required by KRS 520.095(b)(2). 122 S.W.3d 490, 496-97 (Ky. 2003). The Court noted, however, that the defendant "would have created a substantial risk of death or serious physical injury if he had pointed or fired his handgun at [the officer]." *Id.* at 498. That is exactly what occurred in the present case.

However, *Bell* provides dicta that is troublesome to our analysis. In hypothesizing away from the issue before it, the Court stated:

> Admittedly, Appellant would have created a substantial risk of death or serious physical injury if he had pointed or fired his handgun at [the officer]. However if he did so, his offense would be First or Second–Degree Wanton Endangerment because the risk would have been created by his separate criminal act of pointing the handgun or firing. Although that act would have been committed *during* his act of fleeing or eluding, the risk would not have been created "*by* his act of fleeing or evading" as KRS 520.095(1)(b)(2) requires.

Id. (footnotes omitted) (emphasis in original).

The distinction between "by" and "during" in the context of this statute is nothing more than an exercise in semantics. The two words mean essentially the same thing, and the fact that Crayton could have been charged with wanton endangerment does not make the charge of fleeing or evading improper. The two statutes are not mutually exclusive.

Moreover, *by* his fleeing, Crayton subjectively deemed that his flight could best be perpetuated by shooting over his shoulder in the officer's

direction. Also, *by* firing at the officer, he invited the officer to return fire. All of these shots occurred on school grounds located immediately adjacent to a residential community. Further, *by* fleeing from the police, Crayton forced Officer Pawul to engage a moving target. The most expert marksman would concede that engaging a moving target is much more unpredictable than a stationary one, thereby increasing the probability of unintended collateral damage. Therefore, Crayton's actions unequivocally created a substantial risk of serious physical injury or death, not only to himself and Officer Pawul, but to others as well. *Id.*, KRS 520.095 (b)(2). Equally important, if we give deference to the dicta in *Bell,* the actions of Crayton were precipitated *by* his fleeing and evading as well as *during* his flight.

While first-degree wanton endangerment may have been the alternative charge, it was not clearly unreasonable for the jury to convict Crayton of first-degree fleeing or evading. Accordingly, we find that the trial court did not err in denying Crayton's motion for a directed verdict of acquittal.

Tampering with Physical Evidence

Crayton further asserts that the trial court erred in denying his motion for a directed verdict of acquittal for the offense of tampering with physical evidence.

KRS 524.100 provides:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or

used in the official proceeding with intent to impair its verity or availability in the official proceeding; or

(b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

Evidence discovered in an unconventional location supports a tampering conviction. *Commonwealth v. Henderson*, 85 S.W.3d 618, 620 (Ky. 2002); *see also Mullins v. Commonwealth*, 350 S.W.3d 434, 443 (Ky. 2011) ("[P]ursuit by the police may be required for a conventional placement of the evidence to become tampering."). However, "[i]f a defendant walks away from the scene in possession of evidence, this does not necessarily lead to a [tampering] violation[.]" *Id.*

Crayton primarily argues that the evidence did not support a finding that he threw the gun away with the intention of altering or concealing it from the police. In support, Crayton asserts that "[his] intent was not to impair the revolver's . . . availability in an official proceeding. [His] intent was to distance himself from the weapon to keep from getting shot and killed by the police."

It is undisputed that Crayton was discovered by police officers in the back yard of a home located in a residential neighborhood adjacent to Iroquois High School. The revolver was found in the same back yard near the boundary fence, several feet from the wooden deck under which Crayton had been hiding.

We agree with the Commonwealth that, although Crayton presented a plausible theory as to why he discarded the pistol, the jury reasonably believed otherwise. It is well-settled that, on a motion for directed verdict, the

Commonwealth's evidence is presumed to be true and issues of credibility are within the province of the jury. *Benham*, 816 S.W.2d at 187; *see also Allen v. Commonwealth*, 410 S.W.3d 125 (Ky. 2013). Moreover, "a jury may make reasonable inferences from [circumstantial] evidence." *Dillingham v. Commonwealth*, 995 S.W.2d 377, 380 (Ky. 1999) (citing *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997)). The record demonstrates that the Commonwealth presented sufficient evidence that would allow a jury to convict Crayton.

First, the evidence established that the revolver was found within close enough proximity to Crayton's path of flight that he could have reasonably thrown it. Crayton's argument that he tossed the weapon into an open area in "plain sight" does not render the jury's determination clearly unreasonable. The wisdom of a defendant's chosen hiding spot is not dispositive. *See Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998) (holding that defendant's act of placing cocaine under the seat of a vehicle while in plain view of officers supported tampering conviction). *See also Buchanan v. Commonwealth*, 399 S.W.3d 436, 445 (Ky. App. 2012) (holding that evidence that defendant placed a gun in an open doorway of an under-construction building while fleeing the scene of a crime was sufficient to prove intent to conceal for purposes of tampering).

Moreover, the back yard of someone else's home can clearly be classified as an unconventional location for Crayton's loaded pistol. However, we need not belabor the conventional-unconventional analysis because it is undisputed

that Crayton was fleeing from the police at the time he admittedly threw the weapon in the back yard. *See Henderson*, 85 S.W.3d at 620 (noting that police pursuit might convert a somewhat conventional location into an unconventional one sufficient to support a tampering conviction).

Lastly, and most convincing, the jury heard evidence that Crayton threw the weapon down with the intention of later retrieving it and, according to Crayton, the police just happened to find it. During trial, the Commonwealth played a recording of a police interrogation conducted with Crayton the morning of his arrest, wherein the following exchange occurred:

> Officer: How did [the gun] get to where you were found . . . ?
>
> Crayton: Because I was itching to come back for it.
>
> Officer: That's what I mean . . . did you leave it there, to come back for it?
>
> Crayton: I threw it there.
>
> Officer: Threw it? Where? Underneath the porch where you were hiding?
>
> Crayton: Nah, I didn't even throw it under the porch. I just threw it in the back yard.
>
> Officer: You threw it in the back yard there that you were hiding in?
>
> Crayton: Um-hmm.
>
> Officer: Okay. And it just happened to come out where, close to where you were.
>
> Crayton: And they just happened to find it.

Reviewing the evidence as a whole, it was not clearly unreasonable for the jury to determine that discarding the weapon under such circumstances

constituted an additional step or active attempt to impair the availability of evidence. Thus, we find that the trial court did not err in denying Crayton's motion for a directed verdict of acquittal.

Conclusion

For the foregoing reasons, the judgment of the Jefferson Circuit Court is hereby affirmed.

Abramson, Cunningham, Keller, and Scott, JJ., concur. Noble, J., concurs in part and dissents in part by separate opinion in which Minton, C.J., and Venters, J., join.

NOBLE, J., CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority except for its conclusion that Appellant Travis D. Crayton's act of fleeing or eluding the police caused a substantial risk of serious physical injury or death to any person or serious injury to any property. Thus, I believe he could not be convicted of fleeing or evading the police in the first degree.

The pertinent language is in KRS 520.095(1)(b)(2): "*By* fleeing or evading, the person is the cause of, or creates a substantial risk of, serious physical injury or death to any person or property." (Emphasis added.) This condition (along with others not at issue in this case) must be proven for a first-degree fleeing or evading conviction to be sustained. Under the facts of this case, that did not occur.

Crayton robbed the victim, David May, at gunpoint. This was immediately reported and nearby officers responded. The first officer in the area was Daniel Lewis, who saw Crayton counting money. Crayton matched

the description given by May. Officer Lewis pulled up next to Crayton and called him over. Crayton began approaching the cruiser, putting his hands on his head. But when Officer Lewis began to get out of the car, Crayton turned and ran.

Another officer nearby, Michael Pawul, got a radio call that a foot pursuit of an armed-robbery suspect was in progress. He pulled his cruiser into a parking lot between two schools, where he thought the suspect would run. He spotted a figure that appeared to be hiding near the baseball field behind one of the schools. He got out and approached this person, with his sidearm and flashlight drawn, announcing himself as a police officer. The person was Crayton, who approached the officer with his right hand in his pocket. Officer Pawul ordered Crayton to show his hands, but instead Crayton ran behind the scorer's box. Pawul then heard a chain link fence rattle. Thinking that Crayton was gone, Pawul ran around the scorer's box, only to find Crayton pointing a pistol at him. He tried to duck back around the corner and Crayton shot at him, narrowly missing his head. Pawul fell down and Crayton fired a second shot, narrowly missing again. Crawling toward cover, Pawul returned fire. At that point, Crayton climbed the chain link fence and fled, firing two more shots in the direction of Pawul, who returned fire. Crayton got away, running into a residential neighborhood.

Crayton was found some time later by Officer Allan Elder, who was searching the neighborhood that Crayton had run into. Crayton was hiding under a deck of a house. Officers surrounded him and Crayton was ordered to

get on the ground and show his hands. He refused and was tasered. After he was taken into custody, the officers found the .38-caliber revolver used to shoot at Officer Pawul next to the fence on the other side from the house where Crayton was captured. It contained one live round and Crayton later confessed that he had thrown the gun there during pursuit.

As I read these facts, at least two clear crimes occurred, the ones pertinent to this discussion being some degree of fleeing and evading and attempted first-degree assault. Crayton was convicted of first-degree fleeing or evading and attempted first-degree assault.

As to the attempted first-degree assault, this occurred when Crayton shot at Officer Pawul. The evidence plainly supports this conviction. But there is no evidence that Crayton was guilty of first-degree fleeing or evading. The only evidence that supports an inference of any chance or serious risk of serious physical injury or death to any person or property is the proof that Crayton fired his pistol at Officer Pawul. The rest of the time he was merely running, hiding, climbing a fence, or cowering under a deck. No property was damaged and the evidence does not support that any other person was encountered, except the officers in question. Crayton did not run over anyone with a car, knock anybody down, or damage any property.

It is the *shooting* alone that put anyone at any kind of risk. That is a separate crime from fleeing and evading.

That is exactly what this Court was discussing in *Bell v. Commonwealth,* 122 S.W.3d 490 (Ky. 2003). In that case, an armed suspect disobeyed a police

order to stop, which resulted in an on-foot chase. The suspect climbed a fence in his escape and a loaded hand gun fell out by the fence. It did not discharge. After the suspect was caught, the police officer found the hand gun. The Commonwealth argued that first-degree fleeing or evading was the appropriate charge because running with a loaded weapon was so inherently dangerous that a grave risk of injury or death was created. This Court disagreed, stating that the facts must govern in any case, and that under those facts there was simply no substantial risk of harm. The Court recognized that if the defendant had fired any shots, as happened in this case, there would be a risk of harm, but that such acts would create a *different* offense:

> Admittedly, Appellant would have created a substantial risk of death or serious physical injury if he had pointed or fired his handgun at [the officer]. However, if he did so, his offense would be First or Second-Degree Wanton Endangerment [or attempted assault] because the risk would have been created by his *separate criminal act* of pointing the handgun or firing. Although that act would have been committed *during* his act of fleeing or evading, the risk would not have been created '*by* his act of fleeing or evading' as KRS 520.095(1)(b)(2) requires.

Id. at 498 (first emphasis added, footnotes omitted). The Court went on to say that "in order to resolve whether Appellant's *flight* created a substantial risk of death [or injury], we must examine risks created 'by his act of fleeing or eluding,' not that might have been created if Appellant had taken independently dangerous actions during his flight." *Id.*

The majority dismisses this as dicta. But far from being dicta, this language *explains* and fleshes out the holding in *Bell* that no substantial risk was created by the acts of fleeing and evading under the facts of that case.

This discussion was essential to the Court's reasoning. And like in *Bell*, no substantial risk was created by Crayton's act of running away—his fleeing or eluding. That risk only came about when he started shooting at Officer Pawul, which was a separate act.

Thus, I do not agree with the majority that there is no difference in meaning between the terms "by" and "during." Causing a result *by* doing an act is different from a result occurring *during* an act. One denotes causation, a means of reaching a result; and the other merely denotes temporal relationship. They are not at all semantically the same in any way. Thus, Crayton was entitled to a directed verdict on the first-degree fleeing and evading charge.

Minton, C.J.; and Venters, J., join.

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