RENDERED: June 26, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2653-MR

RANDY LEE MCDOWELL — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 95-CR-00056

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

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BEFORE: GUDGEL, Chief Judge, ABRAMSON, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: Randy Lee McDowell appeals from a conviction for criminal attempt to commit first-degree assault and a resulting ten-year sentence. McDowell claims that he was denied due process when the trial court erroneously (1) failed to instruct the jury on all lesser included offenses supported by the evidence at trial; (2) failed to instruct on every essential element of the offense; and (3) violated his right to be free from double jeopardy by holding a trial for attempted murder following his guilty plea to driving under the influence (DUI), both of which constitute the same offense. The Commonwealth counters that McDowell is not entitled to relief because he did

not preserve the claims for appellate review. In his brief filed with the court, McDowell acknowledges that the grounds for his appeal were not preserved in the trial court but contends that review is appropriate pursuant to RCr 10.26. Having reviewed the evidence presented at the trial and the applicable law, we reverse the conviction and remand for a new trial.

On May 11, 1996, Office Bill Hensley of the Ashland Police Department was on bike patrol in front of the Ashland Hotel when he heard tires squealing. He rode to the back of the parking lot where he saw McDowell driving a white Camaro with its headlights off. McDowell was speeding up to the back of a van several times as the van was leaving the parking lot. McDowell then turned the Camaro in the direction of Hensley, who told him twice to stop. Hensley told McDowell to stop a third time but McDowell gunned the engine and his car lurched forward about two car lengths. As Hensley pedalled his bike away from the Camaro, the Camaro hit the bike's back tire, spinning the bike and knocking it and Hensley to the ground. Hensley, uninjured, jumped up and arrested McDowell for wanton endangerment and DUI third offense.

McDowell pled guilty to the DUI charge in Boyd District Court. The Boyd County Grand Jury indicted him on one count of attempted murder. At the September 4, 1996 trial, Hensley testified that he believed that McDowell had intentionally tried to run him down with his car. The trial court instructed the jury on criminal attempt to commit murder and criminal attempt to commit first-degree assault. The record does not reflect that

the trial court considered instructing the jury on other offenses or that McDowell's counsel requested jury instructions on lesser included offenses.

After the jury had deliberated less than one hour, the jury asked the trial court whether there was a lesser offense than attempted first-degree assault of which they could convict McDowell. After the trial court told the jury they had only three options - not guilty, attempted murder and attempted first-degree assault, they found McDowell guilty of attempted assault. Following the penalty phase of the trial, the trial court followed the jury's recommendation and sentenced McDowell to a ten-year prison term.

McDowell first asserts that he was denied due process when the trial court failed to instruct the jury on all lesser included offenses supported by the evidence at trial. Although this issue was not properly preserved for appellate review under RCr 9.54(2), McDowell contends that the trial committed substantial error by failing to instruct the jury on other offenses. RCr 10.26 states:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996), the Kentucky Supreme Court stated the process for deciding whether palpable error has occurred: "upon consideration of the whole

case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."

We believe that palpable error occurred in this case when the trial court failed to instruct the jury on offenses which were raised by the evidence. See Carpenter v. Commonwealth, Ky., 771 S.W.2d 822 (1989). The evidence supported a jury instruction for the offense of criminal attempt to commit second-degree assault. Hensley testified that when he made eye contact with McDowell and on the basis of McDowell's actions, he believed that McDowell was intending to run him over. KRS 508.020(1)(b) defines one type of second-degree assault as intentionally causing physical injury to another person with a dangerous instrument. "A vehicle may be used in such a manner as to constitute a dangerous instrument." Wyatt v. Commonwealth, Ky. App., 738 S.W.2d 832 (1987).

Hensley testified that McDowell was driving his Camaro at about ten miles per hour at the time the Camaro struck the rear of Hensley's bike. From this testimony, it is reasonable to infer that McDowell did not intend to run Hensley over, but instead intended to inflict some physical injury, though not serious physical injury, upon Hensley. If the proof at a new trial is substantially the same as it was at McDowell's first trial, an instruction for attempted second-degree assault will be necessary. Additional proof may also necessitate instructing the jury on other lesser attempted assault offenses.

Two other events support our conclusion that it was

palpable error for the court to fail to include an instruction for a lesser included offense. Hensley arrested McDowell for DUI and wanton endangerment at the scene of the collision. Hensley's initial assessment of the situation thus was to charge a less serious offense. In addition, the jury asked the trial court whether it could convict McDowell of a lesser offense than attempted assault in the first degree. The jury itself apparently believed that the charges submitted to it were more serious than the proof warranted.

McDowell's second argument is that the trial court violated his due process rights when it failed to instruct the jury on every essential element of attempted first-degree assault. Specifically, he argues that the instruction failed to require that the jury find that McDowell intentionally attempted to cause serious physical injury to Hensley by means of a dangerous instrument. The Commonwealth concedes and we agree that an instruction on criminal attempt to commit first-degree assault must include the use of a dangerous instrument as an element of the offense. On remand, any instructions on first-degree assault should be drafted accordingly.

McDowell's final argument is that double jeopardy principles precluded the Commonwealth from prosecuting him for attempted murder after he pled guilty to DUI third offense in Boyd District Court. Although this issue too was not preserved, we can address the merits of the double jeopardy claim. Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977).

In Polk v. Commonwealth, Ky., 679 S.W.2d 231, 233

(1984) the Kentucky Supreme Court addressed the rule in Kentucky governing the prosecution for multiple offenses:

> In Kentucky, the rules governing the prosecution for multiple offenses has been codified in KRS 505.020. Sections 1(a) and (2)(a) & (b) state that when a "single course of conduct" establishes the commission of more than one offense, a defendant may not be convicted of more than one of the offenses if "one offense is included in the other." An offense is so included when it is established by proof of the "same or less than all the facts" required to establish the commission of the offenses charged.
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> This statute is simply a codification of the rule laid down in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). In that case the Supreme Court held that:
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> > [t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Id. at 304, 52 S. Ct. at 182.

In Polk the defendants were convicted of both first-degree burglary and first-degree assault. The Court concluded that convictions for both crimes were proper when the evidence disclosed "additional facts" comprising a second crime committed "after perpetrating" the first crime. The Supreme Court noted that to hold otherwise in such situations would insure that the perpetrator "would have a free ride to commit other crimes . . . because the second crime would have merged into the first." Id.

In this case, Hensley testified that when he first persuaded McDowell to stop his car, which preceded the bike

bumping incident, he realized that McDowell was not in control of his vehicle. Thus, Hensley was aware that McDowell had committed DUI even before McDowell gunned the engine and lurched his car at Hensley. The offense of DUI had occurred prior to Hensley being knocked from his bike. The activity in the parking lot was a continuing course of conduct by McDowell and he can be held responsible for each criminal act committed there. Baker v. Commonwealth, Ky., 922 S.W.2d 371 (1996). Double jeopardy does not preclude a retrial of these events.

For the reasons stated, we reverse the September 20, 1996 Judgment of Boyd Circuit Court and remand for a new trial.

ALL CONCUR.

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