

RENDERED: November 13, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 1997-CA-001535-MR

JAMES L. BATES, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES E. KELLER, JUDGE  
ACTION NO. 97-CR-000456

COMMONWEALTH OF KENTUCKY

APPELLEE

**OPINION**  
**AFFIRMING**

\* \* \* \* \*

BEFORE: BUCKINGHAM, KNOX, AND SCHRODER, Judges.

BUCKINGHAM, JUDGE. James L. Bates (Bates) appeals from a judgment of the Fayette Circuit Court wherein he was sentenced to twelve months in jail for the offense of second-degree wanton endangerment (KRS 508.070) and other misdemeanors and violations. Finding no error, we affirm.

On February 16, 1997, a motorist approached Officer Thomas Johnston of the Lexington-Fayette County Police Department

and told him that a drunk driver was in the area. Officer Johnston proceeded in accordance with the motorist's information to an intersection where he observed a stopped vehicle. Officer Johnston approached the vehicle and observed Bates slumped over the steering wheel while the vehicle's motor was still running. Officer Johnston testified that he noticed a strong smell of alcohol about Bates and that he tapped Bates on the shoulder and asked him to exit the vehicle. Bates then accelerated the vehicle and proceeded through the intersection.

Officer Johnston stated that he followed Bates, who was driving thirty to forty miles per hour. The maximum speed allowed by law on the roads where the officer followed Bates was thirty-five miles per hour. Officer Johnston observed Bates driving on both sides of the road and running stop signs. When Bates's vehicle finally came to a stop, Bates exited the vehicle but was quickly apprehended by the officer.

Bates was indicted for the felony offense of first-degree wanton endangerment and was also indicted for the offenses of operating a motor vehicle on a revoked or suspended license, operating a motor vehicle while under the influence of alcohol, attempting to elude a police officer, disregarding a stop sign, and owning or operating a motor vehicle without insurance. After a trial by jury, Bates was convicted of the lesser included offense of second-degree wanton endangerment as well as the other

misdemeanors and violations.<sup>1</sup> In accordance with the jury's verdict, Bates was sentenced to twelve months in the county jail for second-degree wanton endangerment; he received shorter jail sentences and fines for the other offenses.<sup>2</sup> This appeal followed.

Bates's first argument is that the trial court erred by denying his motion for a directed verdict. At the conclusion of the presentation of all evidence, Bates's counsel moved the court to grant a directed verdict on the first-degree wanton endangerment charge. Counsel argued that there was insufficient evidence that Bates committed the offense of first-degree wanton endangerment but acknowledged that it was proper to submit to the jury the lesser-included offense of second-degree wanton endangerment. The trial court denied Bates's motion for a directed verdict and instructed the jury that it could find Bates guilty of first-degree wanton endangerment or guilty of the lesser included offense of second-degree wanton endangerment.

The trial court's instruction to the jury on second-degree wanton endangerment read as follows:

INSTRUCTION NO. 3  
COUNT 1  
SECOND-DEGREE WANTON ENDANGERMENT

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<sup>1</sup> Bates was also indicted for the offense of carrying a concealed weapon, but he pled guilty to that offense and was sentenced to thirty days in jail. He was likewise indicted for being a persistent felony offender in the first degree, but that charge was dismissed.

<sup>2</sup> Bates's total maximum sentence was twelve months in jail. See KRS 532.110(1)(b).

If you do not find the defendant guilty under Instruction No. 2, you will find the defendant guilty of Second-Degree Wanton Endangerment under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about February 16, 1997, the defendant drove his vehicle on a public highway at excessive speeds and disregarded traffic signals;

(b) That he thereby wantonly created a substantial danger of physical injury to other people using the highway;

If you find the defendant guilty under this instruction, you shall fix his punishment, at confinement in the county jail for a period not to exceed 12 months, at a fine not to exceed \$500.00, or at both confinement and fine, in your discretion.

Bates complains that the trial court erred and should have granted his directed verdict motion on the ground that the Commonwealth failed to prove that he drove his vehicle at excessive speeds, which was stated in the instructions as an element of the offense which the jury must believe beyond a reasonable doubt before finding him guilty. He asserts that the only evidence presented concerning the speed of his vehicle was Officer Johnston's testimony that Bates was driving thirty to forty miles per hour in an area with a speed limit of thirty-five miles per hour.

The Commonwealth argues that Bates is improperly making different arguments to this court from those he made to the trial court and that this court should not consider this argument.

See, e.g., Commonwealth v. Duke, Ky., 750 S.W.2d 432, 433 (1988); Charles v. Commonwealth, Ky., 634 S.W.2d 407, 409 (1982); Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). In support of its argument, the Commonwealth states that Bates did not object to the giving of an instruction on second-degree wanton endangerment. We also note that Bates did not object to the language in the instruction, although he did renew his motion for a directed verdict without stating further specific grounds.

Regardless of whether Bates sufficiently preserved this issue for our review, we determine that his argument on the issue has no merit. The standard for ruling on directed verdict motions was set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Benham provides that

[o]n motion for directed verdict, the trial court must 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.

Id. at 187. 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.

Drawing all fair and reasonable inferences from the evidence, a reasonable juror could have concluded that Bates was

driving at forty miles per hour, especially since Officer Johnston testified that his thirty to forty mile per hour estimate was "conservative." As forty miles per hour was in excess of the legally permitted maximum speed, such testimony is prima facie evidence that Bates was driving at excessive speeds.

Furthermore, given the fact that Bates had been drinking and was not obeying traffic signals, the jury could reasonably have found that Bates was driving at excessive speeds even if he was only going thirty miles per hour. See KRS 189.390(2) which states that "[a]n operator of a vehicle upon a highway shall not drive at a greater speed than is reasonable and prudent, having regard for the traffic and for the condition and use of the highway." See also Potts v. Krey, Ky., 362 S.W.2d 726, 728 (1962), holding that "[a] motorist does not have an absolute right to travel at the maximum speed limit." The trial court's denial of Bates's motion for a directed verdict was therefore not error.

Bates's other argument is that he was improperly charged with and convicted of wanton endangerment in violation of his constitutional rights protecting him from double jeopardy.<sup>3</sup>

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<sup>3</sup> Bates does not comply with CR 76.12(4)(c)(iv) by noting how, or if, this issue was preserved for appellate review. In the past, Kentucky appellate courts have decided questions of double jeopardy on their merits despite a lack of preservation of the issue in the trial court. See, e.g., Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977). However, the Kentucky Supreme Court has recently noted its "discomfort" with "such elevated deference to double jeopardy principles[.]" Butts v. Commonwealth, Ky., 953 S.W.2d 943, 945 (1997). See also Baker v. (continued...)

Bates asserts that in addition to being charged with the specific offenses of operating a motor vehicle under the influence, attempting to elude a police officer, and disregarding a stop sign, the Commonwealth also charged him with wanton endangerment "for the same conduct" in violation of his rights protecting him from double jeopardy. This "same conduct" test is based on Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which was interpreted by the Kentucky Supreme Court in Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996), U.S. cert. denied, 139 L.Ed.2d 323, 118 S.Ct. 422 (1997), to stand for the proposition that "double jeopardy occurs when the 'same conduct' constituting one offense is used to prove an essential element of another offense." Burge, supra, at 809.

In Burge, the Kentucky Supreme Court announced that Kentucky courts would return to analyzing double jeopardy under the principles set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Burge, supra, at 811. Thus, in analyzing a double jeopardy claim, a court is "to determine whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not. . . . Put differently, is one offense included within another?" Id. Using this analysis, Bates's argument fails.

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<sup>3</sup>(...continued)  
Commonwealth, Ky., 922 S.W.2d 371, 374 (1996). We will address the issue.

To be convicted of first-degree wanton endangerment, a person must manifest "extreme indifference to the value of human life" while wantonly engaging "in conduct which creates a substantial danger of death or serious physical injury to another person." KRS 508.060(1). To be convicted of second-degree wanton endangerment, a person must "wantonly" engage in conduct "which creates a substantial danger [of] physical injury to another person." KRS 508.070. None of the other offenses of which Bates was convicted explicitly requires wanton conduct or a substantial danger of physical injury, serious or otherwise, to another. Bates's argument does not withstand the Blockburger/Burge test.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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