

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000045-MR

MATTHEW MAYER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
ACTION NO. 99-CR-001138

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE, BARBER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from those portions of a judgment convicting appellant of assault in the third degree and fleeing or evading the police in the first degree. Appellant argues that there was insufficient evidence of the offenses at issue and that the court should have granted a mistrial when certain exculpatory photographs were improperly withheld from the defense in violation of the pretrial discovery order. We adjudge there was sufficient evidence of the offenses in question and that appellant was not prejudiced by the failure of the police to turn over the exculpatory photographs. Thus, we affirm.

At approximately 10:00 p.m. on March 5, 1999, Jeanine Gibson was resting in the bedroom of her home while her daughters and their friend were watching television in the living room. Appellant, Matthew Mayer, who had formerly lived with Gibson for a period of two years, two-and-a-half years prior to the incident in question, called Gibson and asked if he could come over. Gibson stated that she was tired and told Mayer not to come over. Mayer protested and Gibson then hung up the phone on Mayer. Shortly thereafter, Mayer appeared at the front door of the Gibson residence and demanded to be let inside. No one opened the front door for Mayer and he was told to leave. Instead of leaving, Mayer proceeded to the back door, still yelling to be let in. Again, Gibson told Mayer to leave. Mayer then forced himself through the locked back door and into Gibson's kitchen. Mayer began yelling and moving toward Gibson. Gibson and Mayer then began pushing each other. At one point, Mayer pushed Gibson, causing her to lose her footing and fall to the floor. During the incident, Mayer punched the kitchen door and broke a window pane out of it, cutting his hand. Mayer then exited the house via the back door and proceeded to his car.

At some point during the fray, Gibson's two daughters and their friend ran next door to the home of Bobby Coomer to get help. Coomer is an officer with the Jefferson County Police Department. When Officer Coomer opened the door, Heather Gibson told him, "Matt is trying to kill my mom." After putting on some sweat pants and his duty belt, Coomer told his wife to call the police and ran out the front door. Once outside, Coomer stated

that he heard a car starting up in the back of Gibson's house and observed Mayer's Monte Carlo backing out of the driveway. After Mayer had backed out of the driveway, Coomer stepped in front of the vehicle, forcing Mayer to stop the car. Coomer then proceeded around to the driver's side of Mayer's car and opened the door. It is undisputed that Mayer was acquainted with Coomer and knew that he was a police officer. Coomer then told Mayer, "You need to hold on. The police are on their way." As he spoke to Mayer, Coomer's leg was inside the open door and he was bent down so that he could see Mayer's face. Mayer looked at Coomer when he spoke but said nothing. According to Coomer, Mayer then immediately gunned the car. Coomer testified that when he did, Mayer's tires spun since it had been raining, and his car began "coming around", striking Coomer in the leg. Coomer testified that, although he did not seek medical treatment for the leg, he thereafter experienced soreness in his knee as a result of the injury. As Mayer drove away, Coomer pointed his gun at Mayer's car but did not fire. Coomer thereupon got in his police cruiser and attempted to follow Mayer, but ultimately lost him. After driving away from the scene, Mayer went to a hospital emergency room to seek treatment for the cut on his wrist he received when he knocked the pane out of Gibson's kitchen window.

Mayer was subsequently indicted on the following charges stemming from the events of March 5, 1999: burglary in the second degree; fleeing or evading a police officer in the first degree; wanton endangerment in the first degree; assault in the third degree (as to Coomer); assault in the fourth degree (as

to Gibson); and criminal mischief in the third degree. Following a jury trial, Mayer was found guilty of: trespass in the first degree; fleeing or evading a police officer in the first degree; assault in the third degree; assault in the fourth degree; and criminal mischief. Mayer received concurrent one-year sentences on the third-degree assault and first-degree fleeing or evading a police officer convictions. As to the remaining convictions, he received only fines. The one-year sentence was probated for five years. Mayer now appeals the third-degree assault and first-degree fleeing or evading a police officer convictions.

Mayer argues that the court should have granted his motion for a directed verdict as to the third-degree assault charge because there was insufficient evidence that his conduct was reckless and that Officer Coomer was injured by his conduct. On appellate review, the test of directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). KRS 508.025(1) provides in pertinent part that a person is guilty of assault, third degree, when he:

- (a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:
  - 1. A state, county, city, or federal peace officer;

KRS 501.020(4) defines "recklessly" as follows:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk

that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Mayer maintains that it was not foreseeable that his car would travel sideways when he accelerated from a dead stop and that his hurriedly driving away from Coomer was not reckless under the circumstances. We disagree. The evidence established that it was raining on the night in question. We therefore believe that it was foreseeable that a car would fishtail as described by Officer Coomer when Mayer accelerated from a dead stop. The evidence also established that Officer Coomer had his leg inside the driver's side of the vehicle when Mayer took off. A sudden acceleration under these circumstances was at the very least reckless as there was a substantial risk that Coomer would be injured by such an act. As to Mayer's contention that his pulling away suddenly was justifiable, we believe that was a question for the jury since there was no undisputed evidence that the cut on Mayer's wrist was such that he would have been in grave danger if he had obeyed Officer Coomer's command.

Mayer also argues there was insufficient evidence that Coomer sustained a physical injury from the incident since no photo of the alleged injury was admitted, nor was there evidence that Coomer sought medical attention for the injury. Coomer testified that when the car struck him, his knee was hyper-extended and thereafter began to swell. Coomer further testified that his knee felt sore after the incident. Coomer admitted that he did not seek medical treatment for the injury. KRS

500.080(13) defines a "Physical Injury" as "substantial physical pain or any impairment of physical condition." It has been held that expert testimony is not required to prove a physical injury for criminal purposes. Commonwealth v. Hocker, Ky., 865 S.W.2d 323 (1993). It has also been held that "[v]ictims of crime are competent to testify as to any injury sustained as a result of the crime." Hubbard v. Commonwealth, Ky. App., 932 S.W.2d 381, 383 (1996), (quoting Ewing v. Commonwealth, Ky., 390 S.W.2d 651, 653 (1965)). Accordingly, Officer Coomer's testimony constituted sufficient evidence that he sustained a "physical injury" pursuant to KRS 508.025.

Mayer next argues there was insufficient evidence that he was guilty of fleeing or evading a police officer in the first degree pursuant to KRS 520.095. KRS 520.095(1) provides as follows:

- (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:
    1. The person is fleeing immediately after committing an act of domestic violence as defined in KRS 403.720;

KRS 403.720 provides in pertinent part:

- (1) "Domestic violence and abuse" means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or

assault between family members or members of an unmarried couple;

. . .

- (3) "Member of an unmarried couple" means each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together.

Mayer argues that he did not violate KRS 520.095 because he did initially stop his vehicle as ordered by Officer Coomer. This argument is not well taken. Officer Coomer ordered Mayer to stop his vehicle because other police authorities were on the way. He did not order Mayer to stop his vehicle only for an instant, allowing him to drive away and avoid authorities. Certainly the intent of the statute is to allow police to stop a suspect for a period long enough to question the suspect at the very least or to take the individual into custody if arrested. A statute should not be construed so as to lead to an absurd conclusion, but should be given practical interpretation to carry out its manifest purpose. Reeves v. Fidelity & Columbia Trust Co., 293 Ky. 544, 169 S.W.2d 621 (1943), overruled on other grounds by Kentucky Board of Tax Appeals v. Citizens Fidelity Bank & Trust Co., Ky., 525 S.W.2d 68 (1975).

Finally, Mayer argues that the court erred in refusing to grant a mistrial when a police witness attempted to withhold exculpatory photographs. Prior to trial, the court entered a discovery order requiring the Commonwealth to provide the defendant with all photographs taken in the course of the investigation. The only photographs provided to Mayer prior to

trial were those taken inside the Gibson home. During the cross-examination of Lieutenant Duncan, who was the officer in charge of the investigation, defense counsel asked Duncan if any photos had been taken of the scene outside the Gibson home which might show whether or not Mayer's car had left any skid marks when it left the scene. Lieutenant Duncan responded that such photos were taken, but said film had been overexposed. Defense counsel then asked Duncan if he could see the overexposed film. Duncan stated that the film was in his case file which was in the courtroom. Lieutenant Duncan then produced 12 photos of the scene outside the Gibson home from the night in question. Upon examining the photos, defense counsel moved for a mistrial on grounds that the Commonwealth had withheld exculpatory evidence. The trial court examined the photos and found that the film was not overexposed. Moreover, the court found that one of the photos clearly showed there were no skid marks and was, in fact, favorable to Mayer's defense. However, the court denied the mistrial because the Commonwealth's failure to provide the photographs was unintentional and because Mayer was not prejudiced since Mayer could introduce the photos and cross-examine the Commonwealth's witnesses thereon. Thereafter, defense counsel introduced all of the photographs into evidence and questioned Lieutenant Duncan and Officer Coomer about the photos.

It has been held that the prosecution's failure to provide the defense with certain evidence it was required to provide prior to trial does not automatically require absolute



reversal. McRay v. Commonwealth, Ky. App., 675 S.W.2d 397 (1984). "Some prejudice must be found; otherwise, the error, if any, is harmless." Hicks v. Commonwealth, Ky. App., 805 S.W.2d 144, 149 (1990).

The appellant was prejudiced if as a result of the error, he was denied access to information which, had he possessed it, would have enabled him to contradict or impeach the witness or establish some other fact which might reasonably have altered the verdict.

Maynard v. Commonwealth, Ky., 497 S.W.2d 567, 570 (1973). In Hicks, the Court adjudged that the defendant was not prejudiced by the Commonwealth's failure to provide the defendant with a witness' statement prior to trial in violation of RCr 7.26. The Court stated:

While it [the statement] was not furnished before the direct examination of Edwards, it was produced before his cross-examination by defense counsel. The trial court permitted defense counsel time to examine the statement in order to prepare himself for cross-examination. Moreover, we note that counsel did in fact utilize the statement apparently fully and effectively during his cross-examination of Edwards. While we do recognize that the record does contain a slight intimation that the Commonwealth, by its conduct in failing to timely produce the statement, was attempting to suppress or secret this evidence, such proof is not substantial or compelling. Appellant has not demonstrated prejudice caused by the failure to provide the statement before the direct examination of Edwards or specified how such a timely delivery of the evidence might have reasonably altered the verdict.

Hicks, 805 S.W.2d at 149.

Likewise, in the present case, Mayer obtained the photographs at issue during the cross-examination of Lieutenant Duncan and did, in fact, introduce the photos into evidence and

cross-examine Duncan as well as Officer Coomer about them. While we acknowledge that Lieutenant Duncan's misrepresentation of the quality of the photos was at the very least suspect, the fact remains that Mayer obtained access to the photos during trial and the photos did nothing but help Mayer's case. Mayer argues that if he had obtained the photos in advance of trial, his trial counsel could have sought the opinion of an expert witness as to whether or not the photo rebutted the Commonwealth's contention that Mayer gunned his motor and sped away, causing his car to fishtail. In our view, such expert testimony would not have altered the verdict. Given the lack of skid marks shown in one of the photographs, expert testimony was not necessary for the jury to reach such a conclusion. In fact, the jury acquitted Mayer on the wanton endangerment charge. Mayer took full advantage of the photos during the trial and we do not see that he was prejudiced by their late discovery.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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