RENDERED: September 17, 1999; 2:00 p.m.

ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT: APRIL 12, 1999 (1999-SC-0977-D)

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002641-MR

PAUL ANTHONY PLATACIS APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 96-CR-00089

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART; REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Paul Anthony Platacis (Platacis) has appealed from the judgment of the Bullitt Circuit Court entered on July 23, 1997, convicting him of the offenses of receiving stolen property over $300, (Kentucky Revised Statutes (KRS) 514.110), wanton endangerment in the first degree (KRS 508.060), and being a persistent felony offender in the second degree (PFO II) (KRS 532.080(2)), and sentencing him to serve a total of fifteen years

in the penitentiary.[1] We affirm in part, reverse in part and remand for further proceedings.

On August 21, 1997, Platacis was observed by Police Chief Robert Brian (Chief Brian), of the Lebanon Junction Police Department, in the parking lot of a convenience store, sitting in the driver's seat of a 1995, black, GEO Tracker. The vehicle matched the description of one recently reported to have been stolen from Sonny Bishop Cars, a dealership, located on Preston Highway in Louisville. Starla Perkins (Perkins), Platacis' girl friend, was sitting in the front passenger seat. Their two-year-old child, Tyler Platacis (Tyler), was in the back seat. Chief Brian, who suspected that the car was stolen, called dispatch to ascertain the identity of the owner of the Illinois tag that was on the car. He was informed that the license plate did not belong to Platacis or to the GEO Tracker, but to a 1988 Eagle Talon. When Platacis and Perkins got out of their vehicle, Chief Brian pulled in front of the Tracker, got out of his car, and asked Platacis to put his hands on the police vehicle. Platacis did not cooperate with Chief Brian, but instead ran back into his vehicle and drove away, leaving Perkins behind.

As Chief Brian chased him, Platacis drove east on Ky. Highway 61 to Interstate 65 (I-65). Platacis got on the

---

[1]The jury recommended a sentence of five years to serve on the charge of receiving stolen property, but did not enhance the sentence upon finding him guilty of being a PFO II. It also recommended a sentence of five years to serve on the wanton endangerment count, which it did enhance to ten years upon a finding of guilt on the PFO II count. The trial court, per the jury's recommendation, ordered that the sentences be served consecutively.

expressway, going north, where he drove at speeds in excess of ninety miles an hour, weaving in and out of traffic, and driving on the emergency lane in order to pass other motorists. Chief Brian described the traffic on I-65 asAextremely heavy.@ Platacis exited I-65 at the 112-mile marker, the exit for Ky. Highway 245, and Bernheim Forest. At that exit, Deputy Layne Troutman (Deputy Troutman), of the Bullitt County Sheriff's Department, joined in the pursuit of Platacis. The vehicles reached speeds of eighty-five and ninety miles per hour on the two-lane road as well. Deputy Troutman testified that at times Platacis drove in the middle of the road, causing several on-coming vehicles to take evasive action to get out of his way. Deputy Troutman was able to pass Platacis and the two officers attempted to slow the speed at which Platacis was driving by creating a Arolling road block.@ Platacis pulled into a driveway near Bernheim Forest, and attempted to avoid capture by running into the woods. He left the child, upset and crying, in the car. Platacis was eventually located in the woods by Deputy Michael Minton who had responded to the incident. Tyler was returned to his mother unharmed.

On October 1, 1996, Platacis was indicted on charges of receiving stolen property and on two counts of wanton endangerment in the first degree. One count of the latter charge was returned for the risk incurred by the police officers involved in the chase, and the other count was for the same risk to Platacis' son, Tyler. Platacis was indicted for being a

persistent felony offender in the second degree on February 5, 1997, and was tried by a jury on May 21, 1997.

At trial, Platacis did not dispute the testimony of the officers concerning the details of the chase. Platacis, who was thirty-one years old, testified that he had borrowed the GEO Tracker from his cousin, Neal Platacis, who lived in Louisville. He further testified that in June 1996, when the automobile was reported as stolen, he was living in Indianapolis, Indiana. He stated that his cousin had allowed him to use the vehicle on several occasions that summer in order to visit with his child. He claimed he was using the vehicle immediately prior to his arrest to move his belongings to Lebanon Junction where Perkins and Tyler were residing with Perkins' mother. The Tracker originally had a Kentucky license plate, but Platacis said that his cousin put the Illinois plate on the car a few days before he was arrested. Platacis stated that he realized that the vehicle was stolen only a day or two before his arrest and that he intended to talk to Perkins and her mother to get their help in returning the automobile to the dealership.

Platacis told the jury that he panicked when Chief Brian approached him at the convenience store parking lot. He said that Chief Brian had pulled out his gun, a fact disputed by Chief Brian, and that he did not know what was happening. He further explained that his fear of those involved in law enforcement was the result of the death of his sister in Illinois fifteen years earlier, an event he alleged was caused by police, and his harassment since then by police who, he opined, were

motivated by revenge over his parents' lawsuit for his sister's wrongful death. Platacis also told the jury that he had driven several miles on I-65 before realizing that Tyler was still in the car. He testified that he loved his son andAnever intended to put [Tyler's] life in danger@ He stated that he was afraid to slow down or pull over as he feared that the officers would shoot into the car.

Platacis requested that the trial court give only one instruction on wanton endangerment in the first degree, accompanied by an instruction on the lesser included offense of wanton endangerment in the second degree. He also asked for an instruction on the unauthorized use of a vehicle as a lesser alternative to the offense of receiving stolen property over $300. The trial court declined to give either lesser included offense instruction and gave the jury two opportunities to find Platacis guilty of wanton endangerment in the first degree. The jury returned a verdict finding Platacis guilty of receiving stolen property and guilty on one count of wanton endangerment. The jury acquitted Platacis on the charge of wanton endangerment with respect to the risk in which he placed the police officers involved in the chase.

In his appeal, Platacis raises the sole issue that the trial court committed reversible error in refusing to give the lesser included instructions on wanton endangerment in the second degree and unauthorized use of a motor vehicle. AIt is axiomatic that a trial court must instruct the jury on all lesser included offenses which are justified by the evidence@ Cannon v.

Commonwealth, Ky., 777 S.W.2d 591, 596 (1989)(citations omitted). AOur law requires the court to give instructions 'applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony.@ Reed v. Commonwealth, Ky., 738 S.W.2d 818, 822 (1987)(citing Lee v. Commonwealth, Ky., 329 S.W.2d 57, 60 (1959)). However, in Luttrell v. Commonwealth, Ky., 554 S.W.2d 75, 78 (1977), the Court held that an instruction on a lesser included offense should not be given Aunless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but conclude that he is guilty of the lesser included offense@(citation omitted). See also Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998). With these settled principles in mind, it is apparent that the trial court did not err with respect to Platacis' request for an instruction on wanton endangerment in the second degree, but that it did err in failing to instruct the jury on the unauthorized use of an automobile.

Wanton endangerment in the second degree is, by definition, a lesser included offense of wanton endangerment in the first degree.[2] The distinction between the two crimes was

---

[2]KRS 508.060(1), which defines wanton endangerment in the first degree, provides as follows:

> A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

KRS 508.070(1), wanton endangerment in the second degree, reads:
(continued...)

described in Combs v. Commonwealth, Ky., 652 S.W.2d 859, 860-861 (1983), as follows:

> The higher degree requires that the conduct be wanton under circumstances manifesting an extreme indifference to the value of human life while the lower degree requires only that the conduct be wanton. The higher degree requires conduct which creates a substantial danger of death or serious physical injury while the lower degree is satisfied by conduct which only creates a substantial danger of physical injury.

In Combs, the Court concluded that the trial court did not err in refusing to give an instruction on wanton endangerment in the second degree where the defendant, attempting to leave a grocery store without paying for his groceries, fired a gun six times in the vicinity of store employees and a security guard. A[A] reasonable juror could not doubt that Combs acted wantonly under circumstances which manifested an extreme indifference to the value of human life and, likewise, a reasonable juror could not doubt that his conduct created a substantial danger of death or serious physical injury to another person@ Id. at 861. See also Crane v. Commonwealth, Ky., 833 S.W.2d 813 (1992) (evidence did not justify instruction on second-degree manslaughter or reckless homicide (lesser included offenses to wanton murder) as defendant's conduct of shooting the clerk during robbery Amanifest[ed] an extreme indifference to the value of human life as a matter of law@).

---

[2](...continued)

> A person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person.

Despite Platacis' argument to the contrary, we hold that the reasoning applied in *Combs*, and *Crane*, *supra*, is applicable in the case *sub judice*. Platacis contends that the jury could believe that Athere was no 'extreme indifference to the value of human life', and that the conduct did not create a substantial risk of serious physical injury or death, but merely created a substantial risk of physical injury@ We, however, agree with the Commonwealth that the undisputed evidence of the manner in which Platacis operated the vehicle while fleeing from the police is not susceptible to a finding that he was engaged in conduct that was merely Awanton.@ Stated differently, a reasonable juror could not doubt that Platacis' conduct, of driving at a high rate of speed, in heavy traffic, weaving in and out of traffic and using inappropriate lanes to pass other vehicles, driving in the middle of the road in such a way as to cause other drivers to take evasive action, manifested extreme indifference to the value of human life and created a substantial danger of death or serious physical injury to Tyler.

Platacis argues that the jury's acquittal of him of wanton endangerment vis-a-vis the police officers, evinces a belief by the jury that the chase Ain and of itself@ did not place the police in a situation involving a Asubstantial risk of serious physical injury or death@ Thus, he argues, the jury could have found that Tyler was only at risk of sustaining a mere physical injury. However, this overlooks the argument he made at trial, that is, that the police officers had a choice in whether to pursue him or not and undertake the risk involved, whereas it

is obvious that two-year-old Tyler did not have the same ability to control the situation created by his father. In any event, the jury's verdict with respect to the police officers has no implication on the issue of the legal efficacy of the trial court's failure to give a lesser included instruction to the charge of wanton endangerment in the first degree with respect to Platacis' conduct toward Tyler. In sum, an instruction on wanton endangerment in the second degree was not justified by the evidence and the trial court did not err in declining to give such an instruction.

However, we do find merit to Platacis' argument that the trial court erred in failing to instruct the jury on the unauthorized use of a motor vehicle. Before determining whether Athe evidence would support a guilty verdict on a lesser uncharged offense,@ it is necessary to determine whether the offense Ais a lesser included offense of the charged offense.@ Houston, supra at 929(citations omitted). AA charged offense necessarily includes an uncharged lesser offense if the lesser offense involves fewer of the same constituent elements than the charged greater offence so that the proof necessary to establish the greater offense will of necessity establish every element of the lesser offense.@ Cheser v. Commonwealth, Ky.App., 904 S.W.2d 239, 244 (1994) (Aconcealing the birth of an infant is not a lesser included offense of murder/homicide@). It is clear from an examination of our case law and the statutory definition of a lesser included offense, KRS 505.020(2), that the unauthorized use of an automobile is a lesser included offense of receiving

stolen property whenever the stolen property is a motor vehicle.

KRS 514.110 provides that A[a] person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner@ Pursuant to KRS 514.100(1), a person is guilty of the unauthorized use of an automobile, Awhen he knowingly operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof.@ Proof necessary to establish the elements of KRS 514.110, that is, proof that a person receives property, knowing it to be stolen, and having no intent to return it, would also satisfy all the elements of KRS 514.100. Thus, in a prosecution for receiving a stolen vehicle, where there is evidence that the defendant intended to return the vehicle to its rightful owner, an instruction on the unauthorized use of the vehicle is appropriate.

The Commonwealth relies on Logan v. Commonwealth, Ky.App., 785 S.W.2d 497 (1989), in responding to Platacis' arguments in this regard. In that case, this Court concluded that failure to give an instruction on the unauthorized use of an automobile was not error as there was no evidence to support the instruction. Unlike the defense offered by Platacis, Logan testified that he was unaware that the vehicle he was accused of illegally receiving was stolen, and that it was his belief that it belonged to a friend. ALogan's testimony, if believed, would appear to exonerate him of any criminal wrongdoing, rather than

convict him of unauthorized use of a vehicle@ Id. at 498. Because Logan testified that he did not know the automobile was stolen, there was no evidence concerning his intent to permanently deprive its owner of the car.

The Commonwealth insists that there is no evidence to support the lesser included offense in the case sub judice. It states as follows:

> Appellant points to his testimony that he intended to return the vehicle. However, he did not testify that he intended to return the vehicle but rather gave excuses as to why he hadn't: he Awasn't exactly sure what to do@ and Awas afraid that [he] was going to be arrested.@ Appellant testified that he kept the vehicle even after he knew it was stolen.

We disagree with the Commonwealth's characterization of Platacis' testimony. When considered in its totality, we believe Platacis expressed an intent to return the vehicle to the dealership[3].

---

[3]The relevant testimony from Platacis' direct examination is as follows:

> Q. Okay. Mr. Platacis, at the point we recessed you were testifying to the jury that you had reason to believe or started to believe that the GEO was in fact stolen. Is that correct?
>
> A Yes, sir.
>
> Q. Okay. Once you realized this, what were your intentions?
>
> A. I--I had found out two days before I was arrested--but the next day is when I came back in town in Lebanon Junction and C you know, I don't know a whole lot of people down here except for my girlfriend and her side of the family, and my cousin. And I went to my girlfriend--I always trusted in her--and I went to talk to her and her mom who have always helped me out in the past.

(continued...)

Whether his testimony on the issue of intent was believable or not, was, of course, a matter solely within the purview of the jury. Thus, it was the duty of the trial court to present the question of Platacis' intent to the jury "via an instruction." Luttrell, 554 S.W.2d at 78.

Accordingly, that portion of the judgment of the Bullitt Circuit Court convicting Platacis of wanton endangerment in the first degree is affirmed. The judgment convicting Platacis of receiving stolen property is reversed and this matter is remanded for a new trial consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Hon. Kim Brooks covington, KY	Hon. A. B. Chandler III Attorney General

---

[3](...continued)

> And I--Starla and me at the time were in, you know, just getting back together and I went and she had asked me about the car. Because she had questioned about it because she asked me about the license plate and the car, and I told her what my cousin had told me about the car. And I told her I didn't know where Sonny Bishops was. I don't know where, you know, I didn't know how to get there. I didn't know what to do and I asked for her and her mom if they would help me and in doing so help get the car back.
>
> I wasn't exactly sure what to do if I should call the police. I was just going to take it to Sonny Bishops. I was afraid that I was going to be arrested. Still I mean, I had that fear in me because I was driving the car and I didn't know what was going to happen. So I thought I was doing the right thing by asking them what to do or where to go or, you know, who I should turn to. (Emphasis added.)

Frankfort, KY

Hon. Dana Todd
Assistant Attorney General
Frankfort, KY