

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001028-MR

DERRICK MOTLEY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
ACTION NO. 04-CR-00168

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOFF, JUDGES.

COMBS, CHIEF JUDGE: Derrick Motley appeals his convictions for fleeing or evading police and for being a persistent felony offender in the second degree. Finding no error, we affirm.

On the evening of July 5, 2002, Hopkinsville City Police Officer Jeff Crawford was on patrol when he observed a car driven by Derrick Motley disregard a stop sign at the intersection of Second and Campbell Streets in Hopkinsville. Officer Crawford activated his cruiser's flashing lights and

siren; he notified dispatch that he was about to initiate a traffic stop. However, Motley did not respond to the lights and siren.

Near the intersection of Fourth and Campbell Streets, Motley slowed momentarily behind another vehicle and then cut sharply into a service station parking area in order to avoid the intersection. Motley bounced roughly back onto the roadway, and Officer Crawford continued to pursue the speeding vehicle. Officer Crawford accelerated, bringing him close to Motley's vehicle. Motley erratically overtook the car travelling immediately ahead of him. Other vehicles travelling eastbound were forced to give way. Eventually, Motley's car struck a utility pole. The car spun around in the roadway several times, hit a metal fence, and then struck another utility pole. The car came to rest on the roadway and was blocking traffic in both directions. Motley's vehicle began smoking profusely and was apparently rendered inoperable. Motley jumped from the vehicle but he was met by Officer Crawford, who had drawn his revolver. Motley was placed under arrest.

On March 12, 2004, the grand jury indicted Motley on counts of fleeing or evading police, operating a motor vehicle under the influence of alcohol, disregarding a stop sign, and being a persistent felony offender in the second degree. Motley

pleaded not guilty, and the matter proceeded to trial in February 2005.

During a portion of Officer Crawford's direct testimony, the jury viewed the chase as it was captured on the police cruiser's video-recorder. After the evidence had been presented, the jury found Motley guilty of the felony counts of the indictment. On May 12, 2005, the trial court entered a judgment consistent with the jury's verdict and sentenced Crawford to a total of ten-years' imprisonment. This appeal followed.

On appeal, Motley argues that his trial was riddled with errors. He concedes, however, that the only issue preserved for review was the refusal of the trial court to direct a verdict of acquittal.

KRS<sup>1</sup> 520.095(1)(a) provides that a person is guilty of fleeing or evading police in the first degree 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 . . . [b]y fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property[.]

*Serious physical injury* is defined by KRS 500.080(15) as:

"physical injury which creates a substantial risk of death, or

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<sup>1</sup> Kentucky Revised Statutes.

which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ."

Motley contends that the evidence presented at trial was insufficient to prove him guilty of fleeing or evading police in the first degree. He argues that he was entitled to a directed verdict on the charge because the Commonwealth failed to prove that he either caused or created a substantial risk of serious physical injury or death to any person. We disagree.

We review this argument under the standard set forth in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

On 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.

On appellate review, 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.

The question of whether a suspect's flight creates a substantial risk of death or serious physical injury is

dependent on the particular facts of the case. There are relatively few cases involving a determination of the likelihood of serious physical injury as a matter of law. Lawson v. Commonwealth, 85 S.W.3d 571 (Ky. 2002).

In Bell v. Commonwealth, 122 S.W.3d 490, 497 (Ky. 2003), the Supreme Court of Kentucky observed that a risk must be "ample" or "considerable" in order to rise to the level of being a "substantial risk." A jury may draw all reasonable inferences from the evidence in determining whether a substantial risk of serious physical injury or death was created by the defendant. So may we as a reviewing court.

Motley evaded Officer Crawford by driving erratically at dangerously high speeds. The chase occurred in the dark. It began in a relatively congested traffic area and ended in a smoky, twisted wreck. Drivers in Motley's path veered hastily away from the roadway, and at least two vehicles approaching the crash scene were forced to make unsafe turns to avoid the wreckage. Officer Crawford met Motley with his gun drawn.

We believe that the jury could reasonably infer that Motley's flight created a real and substantial risk of serious physical injury or death to himself and to others. In fact, the evidence in this case is overwhelming, and no jury reasonably could have believed that Motley fled or evaded the police under these circumstances without creating a substantial risk of death

or serious physical injury. See Lawson, supra. Consequently, the trial court did not err in denying Motley's motion for a directed verdict on the fleeing or evading charge.

As noted above, Motley's remaining arguments were not adequately preserved for our review. Nevertheless, we may review the alleged errors under the palpable error standard of RCr<sup>2</sup> 10.26. For an error to be considered palpable, it must be "easily perceptible, plain, obvious[, ]and readily noticeable." Burns v. Level, 957 S.W.2d 218, 222 (Ky. 1997) (citing Black's Law Dictionary (6<sup>th</sup> ed. 1995)). The prejudice caused by palpable error must be "more egregious than that occurring in reversible error." Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005). A palpable error must be so grave in nature that the failure to correct it would seriously affect the fairness of the proceedings. Id. Relief should be granted only if upon consideration of the case as a whole, there exists a substantial possibility that the result in the trial court would have been different but for the error. Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003).

We have closely examined the record in this case. We are not persuaded that there is a substantial possibility that the result would have been any different absent the alleged trial errors. Thus, the errors, if any, were harmless and are

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<sup>2</sup> Kentucky Rules of Criminal Procedure.

not amenable to the palpable error analysis set forth in RCr  
10.26.

The judgment of the Christian Circuit Court is  
affirmed.

ALL CONCUR.

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