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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001330-MR

GARY L. JOHNSON — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 06-CR-00150

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI, SENIOR JUDGE.

STUMBO, JUDGE: Gary Johnson (Appellant) appeals from his convictions of fourth-degree assault, tampering with physical evidence, two counts of first-degree criminal mischief, leaving the scene of an accident, owning and operating a motor vehicle without insurance, and first-degree persistent felony offender. Appellant

argues that he was entitled to a directed verdict on one of the criminal mischief charges because there was no evidence he was the one who caused the damage to the property in question. Additionally, Appellant argues that there was prosecutorial misconduct during the trial. The Commonwealth argues that a directed verdict was not warranted and that there was no prosecutorial misconduct. We agree with the Commonwealth and, therefore, affirm.

On November 11, 2006, Linda Hayden was driving her car near Caneyville when she spotted Appellant's car coming toward her in the opposite lane. Appellant's car was zig-zagging and despite Ms. Hayden's efforts to avoid a collision, the cars had impact.

Appellant, the passenger of his car (Troy Stewart), and Ms. Hayden all got out of the vehicles. Mr. Stewart asked Ms. Hayden if she was okay. Ms. Hayden said she was hurt and needed help. Rather than helping her, both Appellant and Stewart got back into their vehicle and tried to move it down the road. When this proved unsuccessful, they got out, removed the license plate, and fled the scene.

Deputy Matt Darst responded to the crash. After checking on Ms. Hayden, a bystander informed him that Appellant and Stewart were behind the Caneyville Elementary School. When the officer got to the school, he spotted the two men, who then jumped a fence. Deputy Darst then began chasing the two.

Appellant and Stewart fled together at first, but eventually parted company. Deputy Darst continued following Stewart. Stewart jumped into a

creek, but stopped and gave up. Darst went into the creek to apprehend Stewart. When he did this, his radio and taser were damaged. The damage to the radio and taser was the reason for one of the criminal mischief charges. Darst gave Stewart a breathalyzer test, which revealed the presence of alcohol.

Appellant was later captured and Darst testified that he smelled of alcohol. However, because two hours passed before Appellant's capture, no breath test was given. Back at the accident scene, numerous beer cans were found in the floorboard of Appellant's car.

Appellant now argues that because Deputy Darst was chasing Stewart when his equipment was damaged, he could not be guilty of criminal mischief. In other words, the Commonwealth failed to prove he was the one who damaged Darst's equipment.

> On motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky.1991). 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. *Id.* The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. *Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky.1983).

Williams v. Commonwealth, 178 S.W.3d 491, 493 - 494 (Ky. 2005).

Appellant was charged with violating KRS 512.020. That statute states "[a] person is guilty of criminal mischief in the first degree when, having no

right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of $1,000 or more." The indictment on this charge states that Appellant committed this offense when he, "acting alone or in complicity with others," damaged Deputy Darst's radio and taser.

We hold that because both Appellant and Stewart were being pursued by Deputy Darst, both Appellant and Stewart could have been found liable for criminal mischief under the complicity section of the indictment. We do not believe it would be unreasonable for a jury to find Appellant guilty of this crime.[1]

Appellant next argues that there was pervasive prosecutorial misconduct throughout the trial. He points to three specific instances, none of which were preserved on the issue of misconduct. Appellant requests RCr 10.26 review of this issue. "A palpable error which affects the substantial rights of a party may be considered . . . 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." RCr 10.26.

Appellant claims that the Commonwealth elicited an inadmissible prior consistent statement from Deputy Darst. The Commonwealth asked Darst whether Ms. Hayden's testimony was consistent with what he found at the scene.

[1] We note that even though the complicity section of the indictment covers the damage to the equipment, we are not fully persuaded that Appellant met the wanton mental standard utilized by the Commonwealth to find him guilty. However, this argument was not raised by Appellant, so we cannot address it in our opinion.

This testimony was elicited during Darst's discussion of the accident investigation training he received at the State Police Academy at Eastern Kentucky University. This was not a prior consistent statement. Darst was merely explaining that from his experience and training, the scene that Ms. Hayden described was consistent with his physical findings.

Even if his testimony could be considered a prior consistent statement, it would not rise to the RCr 10.26 palpable error standard. This was not a "shocking or jurisprudentially intolerable" error. *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Appellant's next claim of prosecutorial misconduct arises from the Commonwealth's closing argument. Appellant contends that during closing, disparaging remarks were made about his trial counsel. The Commonwealth Attorney referred to defense counsel as "mouthpieces" who told juries that victims were "liars" and that the defense used "sleight of hand tricks" throughout the trial.

In *Matheney v. Commonwealth*, 191 S.W.3d 599, 606 (Ky. 2006), the Kentucky Supreme Court stated that a reversal for prosecutorial misconduct during closing arguments is warranted when the misconduct is "flagrant" or if proof of the defendant's guilt is not overwhelming, defense counsel objected, and the trial court failed to cure the error with an admonishment to the jury.

Here, there was no objection to these statements. Additionally, this was not flagrant misconduct. When we look at the *Matheney* standard as well as

the RCr 10.26 standard, we do not view this as manifest injustice. These were comments made in passing and no further disparaging comments were made.

Finally, Appellant claims the Commonwealth Attorney made appeals to the jury's sense of community during closing arguments. This is not permissible under Kentucky case law. *See Stasel v. Commonwealth*, 278 S.W.2d 727 (Ky. 1955) (where the Court condemned a prosecutor's statement during closing regarding what the people of the county would think if the jury "turned that man loose").

Here, the Commonwealth Attorney told the jury that these crimes were crimes "against the peace and dignity of the Commonwealth of Kentucky" and that Grayson County, "whose citizens you represent, are protected by the law, the criminal law." Unlike the above two instances of alleged misconduct, counsel for Appellant did object to these statements. The relief sought by counsel, however, was an admonishment to the jury, which the judge gave.

> If a party claims entitlement to a mistrial, he must timely ask the court to grant him such relief. *Jenkins v. Commonwealth,* Ky., 477 S.W.2d 795 (1972). Further, we have held that failure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted. "It is well within the realm of valid assumption that counsel was satisfied with the court's admonition to the jury." *Hunter v. Commonwealth,* Ky., 479 S.W.2d 4, 6 (1972). From the foregoing it is clear that a party must timely inform the court of the error and request the relief to which he considers himself entitled. Otherwise, the issue may not be raised on appeal.

West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989). Here, counsel objected, asked for an admonishment, and received one. Counsel did not ask for a mistrial. Even reviewing this under RCr 10.26, the Commonwealth's statements did not amount to manifest injustice. When these statements were made, the Commonwealth Attorney was reading from the indictment and discussing how this was not a civil case, but a criminal case. When taken in context, this does not appear to be an appeal to the community. Even if it were, it certainly is not a palpable error which is "shocking or jurisprudentially intolerable." *Martin* at 4. The case against Appellant was clear and there was an admonishment to the jury, as requested. There was no defect so "manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin* at 5.

Accordingly, the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky