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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000567-MR

DENVER RAY WILLIAMS — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 05-CR-00191

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Denver Ray Williams appeals from a judgment of the Grayson Circuit Court wherein he was convicted and sentenced to

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

18 years in prison for first-degree possession of a forged instrument and for being a second-degree persistent felony offender. We affirm in part and reverse in part and remand.

On June 20, 2005, a man paid for gasoline at Gate Gas in Leitchfield with a counterfeit $20 bill. After the man left the store, the clerk became suspicious that the bill was counterfeit, wrote down the license plate number of the car the man was driving, and reported the incident to the police. The police determined that the car belonged to Williams's ex-wife, and they considered Williams to be a suspect. However, the police did not arrest Williams until early August after Williams's roommate, who had been arrested on unrelated charges, told officers that he had seen Williams print counterfeit money in his home. At that time, the officers obtained a search warrant and searched the residence.

During the search, the officers found various printer ink cartridges, packaging from ink cartridges, and a plastic bag from the packaging of a Lexmark printer/scanner. No printer or scanner was found. They also found a ripped-up copy of a $20 bill in a waste basket. The bill had been printed on plain white printer paper and had not been cut from the full sheet of paper. Only the front of the copy bore any resemblance to an actual $20 bill. The reverse displayed a copy of a photograph of Williams's roommate's child surrounded by much white space.

Williams was arrested and charged with two counts of first-degree criminal possession of a forged instrument and one count of possession of a forgery device. One count of possession of a forged instrument related to the Gate

Gas incident, and the other count related to the ripped-up copy of a $20 bill. The possession of a forgery device charge related to a printer/scanner. A charge of bail jumping was added later after Williams failed to appear in court at his preliminary hearing.

The case was tried before a jury, and the jury acquitted Williams on the possession of a forged instrument charge relating to the Gate Gas incident. It failed to reach a verdict on the charge relating to a printer/scanner as a forgery device and on the bail jumping charge. However, the jury found Williams guilty of possession of a forged instrument based on the ripped-up copy of a $20 bill. The jury also found Williams guilty of being a second-degree persistent felony offender. Williams's sentence was enhanced to 18 years in prison because of his persistent felony offender status.

At trial, Williams moved for a directed verdict, and the court denied the motions. After the verdict, Williams moved for a judgment notwithstanding the verdict on the charge for which he had been convicted and for a dismissal of the charges upon which the jury had failed to reach a verdict. The court likewise denied these motions.

Williams raises various arguments on appeal, including that the court erred in not granting directed verdicts on all charges due to insufficiency of the evidence. We agree with Williams that the court erred by failing to grant a directed verdict on the charge of possession of a forged instrument relating to the

ripped-up copy of a $20 bill. We disagree, however, that the court erred in not dismissing the possession of a forgery device and bail jumping charges.

We will first address the charge for which Williams was convicted, first-degree criminal possession of a forged instrument relating to the ripped-up sheet of copy paper with the image of a $20 bill on the front and the picture of a child on the back. The elements of this offense are set out in KRS 516.050(1) as follows:

> A person is guilty of criminal possession of a forged instrument in the first degree when, with knowledge that it is forged and with intent to defraud, deceive, or injure another, he utters or possesses any forged instrument of a kind specified in KRS 516.020.

A forged instrument must be "a written instrument which is or purports to be or which is calculated to become or represent when completed . . . [p]art of an issue of money[.]" KRS 516.020(1)(a). A written instrument must be "capable of being used to the advantage or disadvantage of some person." KRS 516.010(11).

In *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), the Kentucky Supreme Court stated as follows:

> On motion for a directed verdict, the trial court must draw all fair and reasonable inferences 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 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." *Id*.

The ripped-up pieces of copy paper did not constitute a counterfeit bill or forged instrument. Further, they did not constitute a written instrument which, when completed, would purport to be an issue of money. The "instrument" had a child's picture on the back, had not been cut from the copy paper, and had been torn into pieces. Furthermore, there was no evidence of any "intent to defraud, deceive, or injure another[.]" In fact, prior to the case being submitted to the jury for deliberation, the prosecutor candidly admitted to the trial court that he did not think that the evidence supported the charge, but he unsuccessfully moved the court to amend the charge to a lesser-included misdemeanor offense of attempted possession of a forged instrument. We agree with Williams that the court erred in not granting a directed verdict in his favor on this charge.

Williams also argues that the court erred in not dismissing the possession of a forgery device charge due to insufficiency of the evidence. The Commonwealth sought to prove by circumstantial evidence that Williams possessed a printer/scanner and used it to create forged instruments. No printer/scanner was found in the residence during the search, but printer ink cartridges, packaging from ink cartridges, and a plastic bag from the packaging of a Lexmark printer/scanner were found. Further, there was evidence in the form of a video recording from a WalMart store that showed Williams returning and

exchanging printer/scanners. Additionally, Williams's roommate, who had earlier given police a statement that he had witnessed Williams use a printer/scanner to print counterfeit bills, testified at trial that his earlier statement was not true and that he could not remember ever having seen Williams produce counterfeit bills. The roommate also testified that he was on drugs when he gave the statement and that he didn't remember what he said. He further stated that he would have said anything to get out of jail. Williams's defense was that his roommate was the counterfeiter, not him.

As they relate to this case, the elements of possession of a forgery device are set out in KRS 516.090(1)(b). One must possess "with knowledge of its character any device, apparatus, equipment or article capable of or adaptable to use in forging written instruments with intent to use it himself or to aid or permit another to use it for purposes of forgery." *Id*. Based on the WalMart video recording and on the earlier statement made by Williams's roommate that he had seen Williams use a printer/scanner to produce counterfeit bills, we conclude that the trial court properly denied Williams's directed verdict motion on this charge.

Williams also argues that the court erred in not granting a directed verdict of acquittal on the bail jumping charge in light of KRS 520.070(2), which states in part that "[i]n any prosecution for bail jumping, the defendant may prove in exculpation that his failure to appear was unavoidable and due to circumstances beyond his control."

Williams testified at trial that on the day before he was to appear in the district court for his preliminary hearing, he had an appointment with his doctor and was given a prescription for Percocet. Williams testified that he took the Percocet, overslept the next day, and missed his court appearance because of the drug's effect on him. He further testified that when he awoke, he called his attorney's office and was told by the secretary that the office would let him know what to do about his failure to appear at the hearing. He stated that he first became aware of the charges while in jail after being arrested on other charges.

While this was Williams's testimony, the jury was not required to accept it. *See United States v. Seaton*, 45 F.3d 108, 110 (6th Cir. 1995) (jury entitled to conclude that defendant was lying to prevent his conviction). More importantly, the trial court was not required to grant a directed verdict based on Williams's assurance that he did not intentionally fail to appear. The burden of proof was on Williams to prove justification for missing his court date. *See*, KRS 520.070(2); *see also*, KRS 500.070. Further, "[a]lthough the Commonwealth has the burden of proof, it does not have to rebut evidence of a defense." *Brock v. Commonwealth*, 947 S.W.2d 24, 26 (Ky. 1997). There was also evidence that Williams was in another county on the night before the hearing, which was a violation of his probation on another charge.

"The defendant is not entitled to a directed verdict of acquittal, unless the defense is conclusively established." *Id.* Viewing the evidence in a light most favorable to the Commonwealth and drawing all reasonable inferences therefrom,

we conclude that the trial court did not err in refusing to grant a directed verdict of acquittal on the bail jumping charge.

Finally, we address the dissent, which would order the trial court to dismiss the charges of bail jumping and possession of a forgery device because the jury left the verdict forms blank and did not return a verdict on those charges.

The dissent cites *Whisman v. Commonwealth*, 667 S.W.2d 394 (Ky.App. 1984), as support. This court stated in that case that "failure of the trial jury to reach a verdict by leaving the form blank constituted an acquittal." *Id*. at 399. The dissent reasons that because the trial court accepted the blank forms without declaring a mistrial, as a matter of law Williams was effectively acquitted of the two charges. We respectfully disagree.

First, Williams did not raise this issue in this appeal and did not request relief on this ground from either the trial court or this court. In fact, he acknowledged on pages 4 and 13 of his brief that the reason for the blanks on the forms was that the jury had been unable to reach a verdict on the charges and was "hung."

"[A] reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky.App. 1979) (citation omitted). "Consequently, the trial court's determination of those issues not briefed upon appeal is ordinarily affirmed." *Id*. (citations omitted). Because Williams did not raise this issue before either the trial

court or this court, we disagree with the dissent's view that this issue should be addressed.

Second, although no formal order was entered into the record, the trial judge in this case stated in a bench conference with the attorneys that there was a mistrial on the two charges for which the jury failed to return a verdict. The dissent contends that the court's declaration of a mistrial had no effect because no order granting a mistrial was entered. We know of no authority that would require a written order declaring a mistrial. A mistrial is not ordered; rather, it is declared. Furthermore, Williams did not object to the declaration of a mistrial either at the time or thereafter.

At any rate, we believe that *Whisman* does not apply to the facts in this case. In *Whisman*, the jury left the verdict form blank as to two charges, but as this court therein noted, there was no indication as to whether the jury was unable to reach a verdict on the charges or whether it intended to render a verdict of either guilty or not guilty but failed to indicate its verdict on the form. *Id*. at 399. In this case, however, as Williams has acknowledged, the jury left the blanks because it was unable to reach a verdict. Further, the trial judge stated that the result was a mistrial on those charges.

The dissent has concluded that the blank form as to the two charges effectively results in acquittal. We conclude, however, that the jury was unable to complete the form for the simple reason that it was unable to reach a verdict of either guilty or not guilty. Although the trial court did not have this specific issue

before it, it denied Williams's post-trial motion to dismiss the charges. The clear effect is to allow the Commonwealth the opportunity to try Williams a second time. Kentucky law provides for this, and there is no violation of Williams's double jeopardy rights.

KRS 505.030(4)(b) provides that the trial may be terminated by a trial court even though the jury has not reached a verdict if such is "manifestly necessary." "A classic situation in which a mistrial is manifestly necessary is when jurors are unable to reach a verdict." *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000).

In *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977), the court stated as follows:

> It is elementary, of course, that a mistrial precipitated by a jury's inability to reach a verdict does not prevent another trial of the charges on which the hung jury could have found the defendant guilty.

Id. at 531. In *Cromwell v. Commonwealth*, 523 S.W.2d 224 (Ky. 1975), the court stated:

> It has long been the law of this commonwealth that a defendant is not placed in unconstitutional double jeopardy by being brought to trial for the same offense a second time, after a jury in the first trial had been unable to reach a verdict as to his guilt or innocence.

Id. at 226. In *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), the U.S. Supreme Court stated:

> [w]e reaffirm the proposition that a trial court's determination of a mistrial following a hung jury is not

> an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree.

468 U.S. at 326, 104 S.Ct. at 3086.

Commonwealth v. Ray, 982 S.W.2d 671 (Ky.App. 1998), is on point. In that case, the defendant was charged with first-degree assault and tried by a jury. Following the close of evidence, the trial court instructed the jury that it could find the defendant guilty of the first-degree assault or could find him guilty of either of the lesser-included offenses of second-degree assault or fourth-degree assault. At the conclusion of deliberations, the jury advised the court that they could not reach a verdict. On the verdict form, the jury signed that they found the defendant not guilty of first-degree assault. However, they left the form blank as to the lesser-included offenses. After polling the jury and determining that it intended to find the defendant not guilty of the greater charge but was unable to reach a verdict on the lesser-included offenses, the court declared a mistrial.

Thereafter, the defendant moved the court to dismiss the indictment and prohibit the Commonwealth from trying him again. The court granted the motion, and the Commonwealth appealed. This court reversed the trial court and held as follows:

> A partial verdict where the jury finds guilt or innocence on one or more charges but is unable to reach a verdict on the remaining charges does not bar a retrial on the charges for which no verdict was rendered.

Id. at 673. We likewise conclude that the fact the jury in this case could not reach a verdict on two of the charges and thus left the verdict forms blank does not amount to an acquittal of those charges. Thus, the possession of a forgery device charge and the bail jumping charge are remanded for further proceedings.

We reverse Williams's conviction for the count of first-degree criminal possession of a forged instrument relating to the ripped-up copy of a $20 bill and remand for dismissal. We affirm the trial court's denial of Williams's motion for a directed verdict on the possession of a forgery device charge and remand that charge and the bail jumping charge for further proceedings.

ACREE, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART: This panel has diligently deliberated and vigorously debated the issue of what is the correct legal effect of the two spaces left blank on the jury form. The trial court did not, *sua sponte*, declare a mistrial as to the two charges left blank. Despite the trial judge's statement to attorneys in the bench conference as to a mistrial, **no such oral declaration or written order** was entered as a matter of record. "Courts of record speak only by their orders duly entered . . . ." *Equitable Trust Co. of Dover v. Bayes*, 226 S.W. 390, 391 (Ky.App. 1920)**.**

Williams filed a motion seeking a judgment notwithstanding the verdict as to his conviction on the charge of possession of a forged instrument, which we have reversed. The court denied the motion, and we have reversed the verdict. I concur with that reversal. However, I respectfully dissent as to the majority's disposition of the two remaining charges and would hold that the failure of the jury either to convict or to acquit amounted to an acquittal where the court failed to declare a mistrial or to otherwise ascertain the reasoning of the jury in omitting to vote.

Williams did file a motion for a judgment of acquittal as to the two counts upon which the jury failed to render a verdict: possession of a forgery device and bail jumping. The trial court denied the motion. Williams asked for acquittals based on the overall insufficiency of the evidence on all charges.

Regardless of words spoken by the trial judge in a bench conference, the fact remains that no order of mistrial as to these charges was entered, and, therefore, the legal effect of the blanks on the verdict form must be addressed by this Court on appeal. We cannot bolster that omission by our own.

The majority primarily relies on *Commonwealth v. Ray*, 982 S.W.2d 671 (Ky.App. 1998), in which a jury form was left blank as to lesser-included charges. The jury found Ray "not guilty" of the first-degree assault but failed to address lesser-included offenses. The trial court had polled the jury and specifically found as a matter of record that it was "hopelessly deadlocked" and

that it rendered a **partial verdict** as to the lesser-included offenses. The *Ray* court then declared a mistrial.

In the case before us, the jury rendered an **incomplete verdict** as distinguished from a partial verdict. Upon notice from the jury that they could not reach a verdict, the court failed to poll the jury to determine why it left the blanks. Because a mistrial was not formally declared, the defense was not afforded the opportunity to present an argument with respect to whether a mistrial was manifestly necessary at that point. While a hung jury represents the leading basis for a mistrial based on manifest necessity, a statement from the jury that it is deadlocked does not typically end the inquiry. In any event, **no judicial disposition of the charges was made.**

Under these circumstances, more closely on point than *Ray* is *Whisman v. Commonwealth*, 667 S.W.2d 394, 399 (Ky.App. 1984), where we held that "failure of the trial jury to reach a verdict by leaving the form blank constituted an acquittal." *See also* Leslie W. Abramson, *Kentucky Practice Series Criminal Practice and Procedure* § 30:34 (2008-2009).

Again, as in *Whisman*, the trial court in this case accepted the blank form **without declaring a mistrial** so as to preserve the charges for subsequent re-trial. In light of that critical omission, leaving the final disposition of a criminal charge open to speculation, I am persuaded that Williams was effectively acquitted. *Whisman* wholly and properly dictates such an outcome.

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