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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001339-MR

ASHE LYDIAN — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 09-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,[1] SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Ashe Lydian brings this appeal from a July 6, 2009, judgment of the Nelson Circuit Court sentencing Lydian to ten-years'

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

imprisonment following a jury conviction upon multiple offenses. We affirm in part, reverse in part, and remand.

In the early morning hours of December 4, 2008, Lydian and his cousin, Charles Pointer, left a nightclub known as Still Bill's. Still Bill's was located in close proximity to the courthouse in Bardstown, Kentucky. Pointer's vehicle was parked in Still Bill's parking lot. Pointer and Lydian entered the vehicle; Pointer drove and Lydian was a passenger. While exiting the parking lot, Pointer spun the tires of his vehicle. Officer Andrew Riley observed Pointer's vehicle spinning its tires and initiated a traffic stop. The vehicle stopped. Lydian then exited the passenger side of the vehicle and started running toward the courthouse. Officer Riley pursued Lydian in his police cruiser and attempted to stop Lydian by driving his police cruiser into Lydian's path. Lydian continued to flee even though the cruiser's front tire ran over his foot. Thereupon, Officer Riley abandoned the cruiser and pursued Lydian on foot. Officer Riley repeatedly ordered Lydian to stop. In a field behind the courthouse, Officer Riley subdued Lydian by force and arrested him. In close proximity to where the arrest occurred, Officer Riley discovered Lydian's hat, cell phone, and a small plastic baggie containing cocaine.

Lydian was indicted upon the offenses of possession of a controlled substance (first degree), fleeing and evading police (first degree), resisting arrest, public intoxication, disorderly conduct (second degree), and with being a first-

degree persistent felony offender. Lydian was tried before a jury.[2] The jury returned a guilty verdict upon the charges of second-degree fleeing and evading, first-degree possession of a controlled substance, and resisting arrest. He was also found to be a second-degree persistent felony offender. However, the jury acquitted Lydian upon the charge of public intoxication. The circuit court sentenced Lydian to a total of ten-years' imprisonment. This appeal follows.

Lydian maintains that he was entitled to a directed verdict of acquittal upon the offense of possession of a controlled substance in the first degree. We disagree.

Possession of a controlled substance in the first degree is codified in KRS 218A.1415 and provides:

> (1) A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers or, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.

In particular, Lydian argues entitlement to a directed verdict because the Commonwealth failed to prove an essential element – that Lydian "possessed" cocaine. Lydian points out that the cocaine was not found on his person but rather was found in the field where he was arrested:

[2] The Nelson Circuit Court granted a directed verdict of acquittal upon the charge of disorderly conduct.

> The evidence in this case failed to establish that [Lydian] exercised dominion and control over the controlled substance that was found in the field. [Lydian] had been arrested and was placed in the back seat of a police cruiser before the controlled substance was found. There was no evidence concerning exactly how close the controlled substance was to where [Lydian] had been in the field. Although Officer Riley testified that it was in the area of where he arrested [Lydian], no measurements were taken. There was no evidence that [Lydian] was seen throwing anything away or gesturing as if he was throwing something away. There was no objective facts from which a reasonable juror could find beyond a reasonable doubt that [Lydian] exercised dominion and control over the controlled substance in the field. On the contrary, the evidence showed there were a lot of people at Still Bill's nightclub that night. The evidence showed that Still Bill's was open five or six nights a week and that people walked the neighborhood behind the Courthouse through the field to Still Bill's every day. The evidence showed that almost anyone could have dropped the small baggie of cocaine in the field while they were walking through there.

Lydian's Brief at 13-14.

It is well-established that the element of "possession" in a criminal offense may be proved by either actual or constructive possession. *Johnson v. Com.*, 90 S.W.3d 39 (Ky. 2002), *overruled on other grounds by McClanahan v. Com.*, 308 S.W.3d 694 (Ky. 2010). At trial, the Commonwealth presented sufficient evidence for the jury to find that Lydian possessed the baggie of cocaine. Officer Riley testified that the baggie of cocaine was found in an area where Lydian was physically apprehended and where his hat and cell phone were also found. From this evidence alone, the jury could have reasonably found Lydian guilty of possession of a controlled substance in the first degree. Hence, we do not

believe Lydian was entitled to a directed verdict of acquittal upon first-degree possession of a controlled substance.

Lydian also asserts in this appeal that the Commonwealth's cross-examination of him during trial was so prejudicial as to deny him a fair trial. Lydian particularly sets forth the offending cross-examination:

> The prosecutor began his cross-examination of Ashe by establishing that both Ashe and Ashe's cousin, who was the driver of the vehicle squealing its tires, were convicted felons. The prosecutor then said, "And you know you're not supposed to associate with convicted felons, correct?" When Ashe responded he could be around his immediate family, the prosecutor replied, "But you're not supposed to be around convicted felons, right?" (Citations omitted.)
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> Later during his cross-examination, the prosecutor asked Ashe why he ran from Officer Riley, "It's pretty much because you had cocaine and you didn't want to get caught with it, right?" Ashe responded, "No, never had any coke in my possession." The prosecutor then claimed that Ashe's response had opened the door to introducing the nature of his prior conviction for three counts of trafficking in cocaine. The trial court required the prosecutor to clarify the response, but did not foreclose questioning about the nature of Ashe's prior offense. The follow-up question was, "Now are you telling us you've never had that night or never had it period?" When Ashe denied ever having cocaine, the prosecutor said, "Isn't it true that one of your prior felony convictions, you were convicted of three counts of trafficking cocaine?" Ashe answered in the affirmative. (Citations omitted.)

Lydian argues that Kentucky Rules of Evidence (KRE) 609 only permits the introduction of the existence of a prior felony conviction but not the introduction of the specific felony conviction. Lydian maintains that the

Commonwealth improperly sought to introduce inadmissible and collateral evidence through impeachment. Lydian cites this Court to *Purrell v. Commonwealth*, 149 S.W.3d 382 (Ky. 2004), for the proposition that the impeachment of a witness by collateral evidence is *per se* prejudicial and reversible error.

We observe that *Purrell*, 149 S.W.3d 382, was recently overruled upon this very issue by *Commonwealth v. Prater*, ___ S.W.3d ___ (Ky. 2010). In *Prater*, the Supreme Court held that impeachment of a witness by collateral evidence does not *per se* constitute prejudicial error. Rather, the Court concluded that the trial court possessed discretion upon whether to allow such impeachment by collateral evidence.

In the case at hand, the limited impeachment by the Commonwealth of Lydian was certainly within the trial court's discretion. Moreover, this alleged error is unpreserved for appellate review. Under Kentucky Rules of Criminal Procedure (RCr) 10.26, an unpreserved error may be reviewed upon appeal and relief granted if "manifest unjustice has resulted from the error." Here, the evidence amassed against Lydian was substantial. After fleeing from the vehicle, Lydian was apprehended by police and cocaine was found in close proximity to where Lydian was apprehended. In short, we cannot conclude that manifest unjustice resulted from the Commonwealth's cross-examination of Lydian.

Lydian also argues that the trial court erred by denying a motion for a continuance so that he could retain substitute counsel. The record reveals that

Lydian's jury trial was scheduled for 9:00 a.m. on April 27, 2009. Lydian arrived late, sometime around 10:00 a.m. After *voir dire* of the jury, Lydian requested the trial be continued so he could retain substitute private counsel. Apparently, Lydian was dissatisfied with the public defender appointed to represent him at trial. The trial court then recessed for lunch without ruling on Lydian's motion for continuance of trial. After lunch, the trial court denied the motion. Lydian believes that his Sixth Amendment right to counsel was violated and that the trial court abused its discretion by not continuing the trial.

To decide this issue, we rely upon *Snodgrass v. Com.*, 814 S.W.2d 579 (Ky. 1991),[3] which has a strikingly similar factual scenario. Therein, defendant made a motion for continuance to retain private counsel on the morning of trial. He was represented by a public defender. The trial court denied the motion, and the Supreme Court affirmed. In so doing, the Supreme Court elucidated the applicable legal analysis and review of a trial court's denial of continuance in such situation:

> RCr 9.04 allows a trial to be postponed upon a showing of sufficient cause. The decision to delay trial rests solely within the court's discretion. *Williams v. Commonwealth*, Ky., 644 S.W.2d 335 (1982); *Cornwell v. Commonwealth*, Ky., 523 S.W.2d 224 (1975). Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants,

[3] *Snodgrass v. Com.*, 814 S.W.2d 579 (Ky. 1991), was *overruled on other grounds by Lawson v. Com.*, 53 S.W.3d 534 (Ky. 2001).

> witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice. *Wilson v. Mintzes,* 761 F.2d 275, 281 (6th Cir.1985). To warrant substitution of counsel, appellant must show: (1) complete breakdown of communications between counsel and himself, (2) a conflict of interest, or (3) that his legitimate interests are being prejudiced. *Baker v. Commonwealth,* Ky.App., 574 S.W.2d 325, 327 (1978).

Id. at 581. With the foregoing legal principles in mind, we undertake an analysis of the particular facts herein.

Here, Lydian had ample opportunity to hire private counsel before trial; there was a four-month period between setting the trial date and trial. Additionally, Lydian has not demonstrated a breakdown of communication with defense counsel or a conflict of interest with defense counsel. And, in no way had Lydian shown that "his legitimate interests" were prejudiced. *See Snodgrass*, 814 S.W.2d at 581. As such, we hold that the trial court did not abuse its discretion by denying Lydian's motion for a continuance to retain private counsel.

Next, Lydian argues that the circuit court erred in failing to direct a verdict of acquittal and in its jury instruction upon the offense of fleeing and evading police in the second degree. We shall address each particular argument *seriatim*.

The offense of second-degree fleeing and evading police is codified in Kentucky Revised Statutes (KRS) 520.100 and provides, in relevant part:

> (a) As a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person; or
>
> (b) While operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a recognized direction to stop his vehicle, given by a person recognized to be a peace officer.

Thus, under KRS 520.100, the elements of second-degree fleeing or evading police are:

1. A pedestrian with intent to elude or flee,
2. knowingly or wantonly disobeys a direction to stop,
3. given by a person recognized to be a peace officer,
4. who (peace officer) possesses an articulable reasonable suspicion that a crime has been committed by the pedestrian, and
5. the pedestrian, by fleeing or eluding, causes or creates a substantial risk of physical injury to a person.

In arguing that the circuit court erred by not directing a verdict of acquittal, Lydian maintains that the Commonwealth failed to prove two essential elements of second-degree fleeing or evading – that Officer Riley possessed an articulable and reasonable suspicion that Lydian had committed a crime and that Lydian created or caused a substantial risk of physical injury to any person while fleeing or evading.

To begin, we recognize that the Commonwealth raised a serious question as to whether the trial court's denial of a directed verdict was properly preserved for appellate review. However, as we believe no error occurred, we shall address the issue on the merits.

Upon appellate review, a directed verdict is proper only if it would be clearly unreasonable for the jury to have found defendant guilty of the charged offense. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991). For the reasons hereinafter stated, we do not conclude that Lydian was entitled to a directed verdict upon second-degree fleeing and evading.

As to the element of reasonable suspicion that Lydian committed a crime, the evidence revealed that Officer Riley observed Pointer's vehicle spinning its wheels in Still Bill's parking lot late at night. The officer attempted to effectuate a traffic stop of Pointer's vehicle when Lydian exited the vehicle and fled. Considering that Still Bill's is a bar, that Pointer's vehicle spun its tires in the parking lot, that the traffic stop occurred late at night, and that Lydian's behavior of immediately fleeing the scene was highly suspect, we conclude that the jury could have reasonably found that Officer Riley possessed an articulable and reasonable suspicion that Lydian was guilty of public intoxication.

We reach this conclusion even though the jury ultimately acquitted Lydian upon the charge of public intoxication. Such acquittal does not preclude the jury from finding that Officer Riley possessed an articulable and reasonable suspicion that Lydian was guilty of public intoxication. There is a distinction

between reasonable suspicion that the crime has been committed and the actual commission of a crime. The jury may find the former without finding the latter.

As to the element of Lydian creating a substantial risk of physical injury to any person, the evidence revealed that Lydian's flight certainly created a substantial risk of physical injury. By running from Officer Riley late at night, it is clear that Lydian created a potentially dangerous situation for himself and Officer Riley. In attempting to apprehend Lydian, Officer Riley was forced to pursue him on foot through a dark field with uneven terrain. Pursuit under these circumstances could certainly create a substantial risk of physical injury to Lydian or Officer Riley. Accordingly, we conclude that Lydian was not entitled to a directed verdict of acquittal upon the charge of second-degree fleeing and evading.

The more troublesome issue presented is whether the instruction to the jury upon second-degree fleeing and evading was erroneous. The jury instruction read:

> If you did not find [Lydian] guilty of First[-] Degree Fleeing and Evading Police, you will find [Lydian] guilty of Second[-]Degree Fleeing and Evading Police under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about December 4, 2008, and within 12 months before the finding of the Indictment herein, he knowingly or wantonly disobeyed a direction to stop, which direction was given by a person whom he recognized to be a police officer;
>
> AND

B. That he did so with the intent to flee or elude;

AND

C. That this act of fleeing or eluding caused or created a substantial risk of physical injury to any person.

As previously noted, an essential element of second-degree fleeing and evading is that the police officer possesses an articulable and reasonable suspicion that a crime has been committed. This essential element is notably missing from the jury instruction. It is the trial court's duty to instruct the jury upon each and every essential element of an offense, and the trial court's failure to do so is plainly error. *See Stewart v. Com.*, 306 S.W.3d 502 (Ky. 2010). Therefore, we conclude that the jury instruction upon second-degree fleeing and evading was erroneous. However, it appears that Lydian neither objected before the trial court to the erroneous jury instruction nor preserved this error for appellate review. RCr 9.54. We, thus, review the error under the substantial or palpable error rule of RCr 10.26. Thereunder, an error is only reversible if the substantial rights of defendant were affected resulting in manifest injustice. RCr 10.26.

Considering the particular facts of this case, we believe the erroneous jury instruction amounted to palpable error under RCr 10.26. In particular, the jury acquitted Lydian upon the offense of public intoxication, which is significant as it was this crime that Officer Riley ostensibly possessed a reasonable suspicion that Lydian committed. Considering same, it was imperative that the jury specifically find that Officer Riley possessed such reasonable suspicion in light of its acquittal

upon the same offense. The evidence at trial was conflicting – a jury could have reasonably found that Officer Riley did or did not possess such a reasonable suspicion of Lydian's public intoxication. Additionally, we observe that the Commonwealth's evidence to support the officer's reasonable suspicion that Lydian committed the offense of public intoxication was largely circumstantial and was capable of varied inferences. Accordingly, we are of the opinion that the erroneous jury instruction upon second-degree fleeing and evading constituted a substantial or palpable error under RCr 10.26 and reverse Lydian's conviction of this offense. *See Stewart*, 306 S.W.3d 502.

In sum, we reverse Lydian's conviction upon the offense of second-degree fleeing and evading the police and remand for a new trial per the Commonwealth's discretion. We affirm his conviction upon all other offenses.

For the foregoing reasons, the judgment of the Nelson Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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