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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001153-MR

ROBERT C. WILSON — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 11-CR-00034

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, JONES AND MAZE, JUDGES.

MAZE, JUDGE: Robert C. Wilson appeals from a judgment of conviction in the Bell Circuit Court for second-degree assault and first-degree wanton endangerment. He argues that his conviction for second-degree assault was based on insufficient evidence, and that both convictions were tainted by improper evidence relating to dismissed drug charges. He also argues that his convictions

for both assault and wanton endangerment amount to double jeopardy. Although we find no merit to Wilson's double jeopardy challenge, we agree that his convictions must be set aside for the other reasons. Hence, we reverse and remand for a new trial.

On October 12, 2012, Wilson fired a .38-caliber pistol from the porch of his residence. He states that he aimed the gun at the ground and was attempting to scare off cats which were in his garbage. However, a bullet from the pistol entered a home directly across the street and struck Alvin Mason in the leg. Mason was transported to the hospital where his wound was cleaned and stitched. He was released from the hospital that same day.

Robin Browning, the ex-wife of Van Fuson, who owned the home where Mason resided, testified that she heard three shots fired. Wilson, however, insists that he only fired one shot and then set off firecrackers a short time later. Browning states that she immediately confronted Wilson because the shots hit the Fuson home, although she did not know that Mason had been struck at that time. Wilson left the scene and was found at the home of an acquaintance later that day.

Based upon this incident and a subsequent search of his residence, Wilson was indicted on three counts of first-degree wanton endangerment, and one count each of first-degree assault, first-degree possession of a controlled substance, possession of prescription medication not in original container, possession of marijuana, possession of drug paraphernalia, and first-degree criminal mischief. Prior to trial, the assault charge was amended down to second-degree assault, and

one of the wanton endangerment counts was amended down to second-degree wanton endangerment. The Commonwealth also agreed to dismiss one count of first-degree wanton endangerment, as well as the drug and criminal mischief charges.

Following a trial, the jury found Wilson guilty on the assault and first-degree wanton endangerment counts, but not guilty on the charge of second-degree wanton endangerment. The jury fixed his sentence at a total of five years' imprisonment, which the trial court imposed. This appeal followed.

Bell first argues that he was entitled to a directed verdict of acquittal on the charge of second-degree assault. The standard for granting a directed verdict is set out in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky.1991), as follows:

> 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.

Id. at 187, citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

Wilson argues that the Commowealth failed to prove an essential element of the charge of second-degree assault. Under Kentucky Revised Statutes (KRS) 508.020(1), a person is guilty of second-degree assault when,

> (a) He intentionally causes serious physical injury to another person; or
> (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

In this case, the jury was instructed under subsection (1)(a), requiring proof that Wilson intentionally caused a physical injury to Mason. Wilson contends that there was no proof that he intended to shoot at Mason's house or to injure him. Rather, Wilson maintains that the only evidence showed merely that he was shooting at a cat to scare it away from the garbage can. As a result, Wilson argues that it was unreasonable for the jury to find him guilty of intentional second-degree assault, and therefore he was entitled to a directed verdict on this count.

In response, the Commonwealth correctly notes that intent may be proven by evidence of the surrounding circumstances. Intent and knowledge can be established by circumstantial evidence, and a jury may make reasonable inferences from the evidence at hand. See *Dillingham v. Commonwealth*, 995 S.W.2d 377, 380 (Ky. 1999). The Commonwealth suggests that the jury could infer Wilson's intent to shoot at the Fuson residence from this evidence. The

Commonwealth also maintains that this intent may be inferred from Wilson's evasive behavior after the shots were fired.

But at trial, the Commonwealth never claimed that Wilson was aiming his pistol at any person or even at the Fuson house. Rather, the Commonwealth only argued that Wilson's intentional firing of the gun was sufficient to establish that the assault was intentional. This argument is inconsistent with the clear language of the statute.

KRS 501.020(1) provides that, "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct." The Commonwealth focused on the latter portion of that definition, arguing that Wilson intended to "engage in that conduct," noting that Wilson intentionally fired his pistol at the cat. However, the phrase "to cause that result or to engage in that conduct" cannot be applied in a vacuum but must be read in connection with the underlying offense to which the result or conduct relates. In this case, the instruction for second-degree assault required proof that Wilson intentionally caused a serious physical injury to Mason. The crux of the offense concerns the result, not the specific conduct.

Under KRS 501.060(2), when intentionally causing a particular result is an element of an offense, the element is not established if the actual result is not within the intention or the contemplation of the actor unless:

> (a) The actual result differs from that intended or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm intended or contemplated would have been more serious or more extensive; or
> (b) The actual result involves the same kind of injury or harm as that intended or contemplated and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

The only evidence presented was that Wilson intentionally fired the pistol at a cat in his garbage. The injury to Mason is a substantially different kind of harm than the result which a reasonable person could have intended from the conduct in firing the pistol under these circumstances. Although this conduct may have been sufficient to establish wanton assault under KRS 508.020(1)(c), the jury was only instructed on intentional assault. Therefore, we conclude that the instruction for intentional second-degree assault was improper.

However, Wilson only argues that he was entitled to a directed verdict on the charge of second-degree assault; he does not challenge the sufficiency of the instructions. Moreover, a directed-verdict motion is reviewed in light of the proof at trial and the statutory elements of the alleged offense; it is not controlled by the instructions. *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013), citing *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011). Thus, a directed verdict may be inappropriate even though the jury instructions were flawed. *Id.* In this case, the evidence supported the charge of second-degree assault, but not under the instruction given. Consequently, a directed verdict was not appropriate

because the evidence supported the charge of second-degree assault under an alternative theory. *Id.* at 818.

Under these circumstances, Wilson's motion for a directed verdict does not preserve any objection to the erroneous instruction. *Id.* at 819. Because the error was not adequately preserved for appellate review, reversal is allowed only if this Court finds the error to be palpable. *See* Kentucky Rules of Criminal Procedure (RCr) 10.26. A palpable error occurs when the substantial rights of a defendant are violated and a manifest injustice results. *Id.* Manifest injustice requires "showing ... [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Nevertheless, a conviction under an instruction which is not supported by the evidence constitutes palpable error, even if the evidence could have supported a conviction under the proper instruction. *Acosta*, 391 S.W.3d at 820. At most, the Commonwealth's proof showed only that Wilson wantonly caused serious physical injury to Mason by means of a deadly weapon. In such cases, the appropriate remedy is to set aside the conviction for second-degree assault and order a retrial under the appropriate instruction. *Id.* at 820.

Wilson also raises two additional issues which are not preserved for review. Therefore, we also review these issues under the palpable error standard of RCr 10.26. Wilson next argues that he was denied a fair trial based upon testimony about the dismissed drug charges. The first witness for the

Commonwealth, Kentucky State Police Trooper Tyson Lawson, testified about the search of Wilson's mobile home and finding marijuana and drug paraphernalia in the residence. In addition, the Commonwealth introduced these items as exhibits in evidence. The Commonwealth also asked Wilson about the items on cross-examination, and he admitted that they belonged to him.

Wilson argues that this evidence was irrelevant and constituted admission of prior bad acts in violation of Kentucky Rules of Evidence (KRE) 404(b). We agree. It is well-settled that the Commonwealth cannot introduce evidence of charges that have been dismissed or set aside. *Blane v. Commonwealth*, 364 S.W.3d 140, 152 (Ky. 2012); citing *Cook v. Commonwealth*, 129 S.W.3d 351, 365 (Ky. 2004), *Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996), and *Chavies v. Commonwealth*, 354 S.W.3d 103, 115 (Ky. 2011). The Commonwealth makes no effort to explain how this evidence was relevant to the offenses of second-degree assault or first-degree wanton endangerment. Likewise, Wilson's subsequent testimony on cross-examination does not operate to waive the error because it was the Commonwealth who interjected this irrelevant issue.

We are at a loss to explain why such a clear error was not preserved. However, we conclude that Trooper Lawson's testimony, admission of the exhibits, and the questions to Wilson on cross-examination amounted to palpable error. We have no way to determine whether admission of this clearly improper evidence influenced the jury's determination of guilt. *Blane*, 364 S.W.3d at 153.

Although we are reversing Wilson's conviction for second-degree assault on other grounds, we must also reverse his conviction for first-degree wanton endangerment and remand this matter for a new trial on both counts.

Finally, Wilson contends that his convictions for second-degree assault and first-degree wanton endangerment violate his rights against double jeopardy. The respective double jeopardy clauses of the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution prohibit a person from being twice punished or twice convicted for the same offense. But double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute requires proof of an additional fact which the other does not. *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1997), citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932). This rule is further explained in KRS 505.020, which allows prosecution for multiple offenses arising from a single course of conduct, but prohibits such prosecution if the offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process.

We find no error, palpable or otherwise. Generally, assault and wanton endangerment each require evidence of facts which the other does not. Second-degree assault requires a finding of physical injury, serious or otherwise, and may require proof of the use of a deadly weapon or dangerous instrument. KRS 508.020. On the other hand, wanton endangerment merely requires conduct

which creates a substantial danger of death or serious physical injury to another. KRS 508.060. Unlike assault, the gravamen of wanton endangerment is creating the risk of death or physical injury, not actually causing it. *Matthews v. Commonwealth*, 44 S.W.3d 361, 365 (Ky. 2001); *Hennemeyer v. Commonwealth*, 580 S.W.2d 211 (Ky. 1979).

Although Wilson testified he only fired one shot, Robin Browning testified that she heard three shots fired. About a month after the incident, the Fusons found a second bullet lodged in a different area of the house. Furthermore, while the assault charge was based upon the injury to Mason, the wanton endangerment charge was based upon the additional shots fired and the presence of Amber Fuson in the house. Because the elements of each crime are distinct and were directed toward different persons, the Commonwealth properly charged Wilson with second-degree assault and first-degree wanton endangerment. *See Alexander v. Commonwealth*, 766 S.W.2d 631, 632 (Ky. 1988).

Accordingly, the judgment of conviction by the Bell Circuit Court is reversed, and this matter is remanded for a new trial on the charges of second-degree assault and first-degree wanton endangerment.

ALL CONCUR.

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