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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000646-MR

MICHAEL SCOTT DURBIN

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 13-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: D. LAMBERT, MAZE, AND VANMETER, JUDGES.

MAZE, JUDGE: Michael Durbin appeals from his conviction and sentence on a charge of fleeing and evading police in the first degree. He argues that the trial court erred when it overruled his motion for a directed verdict and permitted a witness for the Commonwealth to testify concerning a gesture Durbin made during

the officer's attempt to stop him. Durbin also raises an unpreserved issue concerning his characterization of other witness' testimony as untrue.

We observe no error in the trial court's rulings regarding the issues Durbin raises. Hence, we affirm.

Background

On April 14, 2013, Kentucky State Police set up a traffic safety checkpoint at the remote intersection of Kentucky Highways 187 and 238 in Edmonson County. Troopers Newkirk and Starns were working the checkpoint and their cars were parked nearby with emergency lights activated. At or around 8:30 p.m., Durbin approached the checkpoint driving his pick-up truck; however, he proceeded past the checkpoint and turned down Highway 238 without stopping. When Durbin did not heed Trooper Newkirk's verbal order to stop, Trooper Newkirk got into his marked cruiser and pursued Durbin with his lights and sirens activated. Trooper Newkirk ordered Durbin to stop via the PA system on his cruiser; however, Durbin continued to drive. At some point during the pursuit, Durbin signaled Trooper Newkirk with a hand gesture outside the car. After traveling nearly a mile from the checkpoint at around thirty miles per hour, Durbin pulled into the driveway of an acquaintance. Despite Trooper Newkirk's order not to pull up the long driveway and closer to the house, Durbin did so and parked his truck.

When Trooper Newkirk approached Durbin, he observed a smell of alcohol and that Durbin's eyes were bloodshot. Durbin acknowledged that he

heard the Trooper's sirens. After he failed a field sobriety test, Durbin told Trooper Newkirk, "so I smoked marijuana a couple hours earlier, woo-hoo, arrest me." When Durbin failed two additional field sobriety tests, Trooper Newkirk took him up on his offer.

A search of Durbin's truck revealed an open, partially emptied beer bottle, an empty vodka bottle, marijuana, and rolling papers. Durbin refused all requests for breath, blood, or urine tests. Authorities subsequently charged Durbin with fleeing or evading police in the first degree, a felony. They also charged Durbin with possession of marijuana, possession of drug paraphernalia, possession of an open alcohol container in a motor vehicle, and operating a motor vehicle on a suspended license.

At Durbin's February 4, 2015 trial, Troopers Starns and Newkirk testified to the events surrounding their encounter with Durbin. Trooper Newkirk also testified concerning his pursuit of Durbin. Of note, he stated that, at the time, he took Durbin's hand gesture "to mean, 'what do you want? What have I done? Why are you bothering me?'" Durbin's counsel objected to this testimony; however, the trial court overruled the objection. Durbin later testified that his gesture was intended to inform the officer that he would pull over.

Durbin's counsel properly made two motions for a directed verdict, both of which the trial court overruled. The jury convicted Durbin on all charges, recommending the maximum sentence of five years' imprisonment on the fleeing

and evading charge and fines on the remaining charges. The trial court accepted the verdict and the recommended sentence. Durbin now appeals.

Analysis

Durbin first argues that the trial court erred when it overruled his motion for a directed verdict. He contends that the Commonwealth failed to present sufficient evidence of his intent to flee or evade police to necessitate a jury's review. We disagree.

To survive a defendant's motion for a directed verdict, the Commonwealth need only present more than a mere scintilla of evidence. *See Commonwealth v. Benham*, 816 S.W.3d 186, 187 (Ky. 1991). If, in light of the evidence and drawing all fair and reasonable inferences in favor of the Commonwealth, it would be reasonable for the jury to find guilt beyond a reasonable doubt, the motion must be overruled. *Id.*

We review the trial court's decision on directed verdict in light of the statutory elements the Commonwealth was required to prove. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011). Accordingly, KRS 520.095(1)(a) reads, in pertinent part,

(1) A person is guilty of fleeing and evading police in the first degree:

(a) When, while operating a motor vehicle with the 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 at least one (1) of the following conditions exists:

...

2. The person is driving under the influence of alcohol or any other substance or combination of substances in violation of KRS 189A.010[.]

Durbin argues that the Commonwealth failed to establish his “intent to elude or flee[.]” As support, Durbin points exclusively to the fact that he drove slowly throughout the pursuit and did not drive erratically or run stop signs or stop lights. However, Durbin’s reliance upon these facts as a means of establishing his intent, or lack thereof, is legally unfounded.

Durbin attaches significance to his speed and overall conduct during the pursuit which does not exist in the law. The fleeing or evading statute does not mention these factors or list a threshold of speed or erratic behavior necessary to find guilt. Rather, Durbin’s intent to flee or evade police “can be inferred from the act itself and the surrounding circumstances.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 427 (Ky. 2002) (citations omitted). The record at trial, including Durbin’s own testimony, established that he heard at least one of Trooper Newkirk’s orders to stop; yet, he continued to drive his truck away from police. This is reasonably viewed as an intentional effort to evade police. Accordingly, a reasonable juror could conclude from the evidence presented at trial that Durbin intended to flee or evade police; and the trial court properly sent the question of Durbin’s guilt to the jury.

Durbin next argues that the trial court erred in permitting Trooper Newkirk to testify regarding the hand gesture Durbin made during the pursuit.

Specifically, Durbin contends that to permit Trooper Newkirk's testimony was irrelevant, prejudicial, and impermissible opinion testimony.

A trial court enjoys broad discretion over the admission or exclusion of evidence and testimony. *See Olden v. Commonwealth*, 203 S.W.3d 672, 678-79 (Ky. 2006) (citing *Simpson v. Commonwealth*, 889 S.W.2d 781, 782 (Ky. 1994)). Therefore, we will reverse the trial court's decision to admit Trooper Newkirk's testimony only if it constituted an abuse of discretion, that is, it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRE 701 states:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness;
- (b) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of KRE 702.

Since Kentucky's adoption of KRE 701, its courts have viewed the Rule "as more inclusionary than exclusionary when the lay witness's opinion is rationally based on the perception of the witness...." *Hampton v. Commonwealth*, 133 S.W.3d 438, 440-41 (Ky. 2004) (quoting *Clifford v. Commonwealth*, 7 S.W.3d 371, 377 (Ky. 1999) (Johnstone, J., concurring)).

Nevertheless, Durbin argues that Trooper Newkirk's testimony ran afoul of Rule 701 and our Supreme Court's ruling in *Cuzick v. Commonwealth*,

276 S.W.3d 260 (Ky. 2009). In *Cuzick*, the trial court permitted a police officer's testimony which consisted of answers to the prosecutor's questions and included descriptions of events captured on the officer's in-car camera. The Supreme Court held this to be proper, stating that "[w]hile a witness may proffer narrative testimony within the permissible confines of the rules of evidence, we have held he may not 'interpret' audio or video evidence, as such testimony invades the province of the jury, whose job it is to make determinations of fact based upon the evidence." *Cuzick* at 265-66 (quoting *Gordon v. Commonwealth*, 916 S.W.2d 176 (Ky. 1995)).

The case to which the *Cuzick* Court cited, *Gordon v. Commonwealth*, is important to our analysis, as well. In *Gordon*, the trial court permitted an audio recording to be played for the jury during an informant witness's testimony. The witness testified concerning his recollection of the recorded conversation, but he also transcribed a portion of the tape which was inaudible. The Supreme Court held that admission of the latter testimony was impermissible, as "it [was] apparent that the witness purported to interpret the tape recording rather than testify from his recollection. ... It is for the jury to determine as best it can ... without embellishment or interpretation by a witness." *Gordon*, 916 S.W.2d at 180.

Similarly, in *Crowe v. Commonwealth*, 38 S.W.3d 379 (Ky. 2001), a lay witness testified that he had observed a spot of what he believed at the time to be blood, and that when he returned to the same location shortly thereafter, the spot

was gone. The Supreme Court affirmed admission of this testimony on the grounds that the witness

did not opine that the substance was blood; he only stated that it appeared to him to be blood, i.e., it looked like blood. His testimony was rationally based on his own perception of what he personally observed and was helpful in determining a fact in issue, *viz*: whether [the defendant] attempted to conceal the fact that there was blood inside his residence.

Crowe at 384.

Trooper Newkirk's testimony was compliant with Rule 701; it was distinguishable from the testimony presented in *Gordon*; and it was comparable to that presented in *Cuzick* and *Crowe*. Following Durbin's objection, the trial court ruled that Trooper Newkirk was permitted to testify to "what he thought but he can't tell what [Durbin] intended by that. There's a slight difference in that." Indeed, there is a difference, and the above law bears that out. Trooper Newkirk's testimony did not take observable facts and instruct the jury on how it should view or understand those facts. In other words, unlike the witness in *Gordon*, his testimony did not stray from recollection or engage in "embellishment or interpretation." *Gordon* at 180. Like the testimony in *Crowe*, Trooper Newkirk's testimony merely recalled how he perceived the gesture at the time Durbin made it. This difference is key, and it favors admission under Rule 701. Additionally, Trooper Newkirk's testimony assisted the jury with a fact in issue: whether or when Durbin was aware of Trooper Newkirk's presence and order to stop. This

issue went to the heart of a necessary element of the case against Durbin under KRS 520.095(1).

For similar reasons, Trooper Newkirk's testimony was neither irrelevant nor unduly prejudicial to Durbin's defense. Again, that Durbin gestured to police and how police perceived that gesture are facts which are relevant to Durbin's awareness of police presence and their orders to stop, as well as the intent behind his failure to stop in defiance of those orders. Durbin contends that the testimony "painted [him] in an unflattering light" for the jury. Little evidence the Commonwealth brings in an effort to convict someone would not. More importantly, the probative value of Trooper Newkirk's testimony far outweighed any prejudice. *See* KRE 403. The trial court's decision to admit the testimony was consistent with Kentucky law and the Rules of Evidence.

Finally, Durbin challenges an exchange between the Commonwealth and Durbin on cross-examination during which the Commonwealth repeatedly asked Durbin if he believed the officers' testimony had been untruthful. Such testimony is generally impermissible. *See, e.g., Caudill v. Commonwealth*, 120 S.W.3d 635, 662 (Ky. 2003) and *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997) (holding that "[a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony.").

Durbin concedes that he did not preserve this issue for our review on appeal. When an error is unpreserved, we will not consider its merits unless it is a “palpable error which affects the substantial rights of a party ... upon a determination that manifest injustice has resulted from the error.” RCr¹ 10.26. A showing of manifest injustice requires “a probability of a different result or error so fundamental as to threaten [his] entitlement to due process of law.” *Acosta v. Commonwealth*, 391 S.W.3d 809, 819 (Ky. 2013) (citation and quotation marks omitted). Durbin can show neither.

We cannot conclude that, but for Durbin’s single statement concerning the accuracy of the officers’ testimony concerning his ability to stop along the side of the road, the result of his trial would have been different. The abundance of other evidence and testimony against him at trial belies any such conclusion. Therefore, we decline Durbin’s request to undertake palpable error review of this alleged and unpreserved error.

Conclusion

The trial court properly submitted the question of Durbin’s guilt under KRS 520.095 to the jury. The trial court also did not abuse its discretion in admitting Trooper Newkirk’s recollection and perception of Durbin’s hand gesture. Accordingly, the Edmonson Circuit Court’s March 16, 2015 Trial Order and Judgment of Conviction, as well as the subsequent Sentencing Order, are affirmed

¹ Kentucky Rules of Criminal Procedure.

ALL CONCUR

BRIEF FOR APPELLANT:

John Gerhart Landon
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Courtney J. Hightower
Frankfort, Kentucky