RENDERED: DECEMBER 1, 2017; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000013-MR

WILLIAM STEPHENSON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN LAPE, JUDGE
ACTION NO. 15-CR-00394-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, JOHNSON, AND MAZE, JUDGES.

MAZE, JUDGE: On May 28, 2015, a Kenton County grand jury returned an indictment charging William Wayne Stephenson, Jr. with one count each of first-degree possession of a controlled substance, possession of drug paraphernalia, and theft of identity. Stephenson was later charged with being a persistent felony offender in the first degree (PFO I). Following a trial, the jury acquitted Stephenson of the possession charges, but convicted him of theft of identity. The

jury fixed his sentence at five years' imprisonment, enhanced to fifteen years by virtue of his status as a PFO I. The trial court imposed the jury's sentence, and Stephenson now appeals from this judgment.

Stephenson argues that the trial court erred by denying his motion for an instruction on giving a false name to a peace officer as a lesser-included offense to theft of identity. We agree, concluding that the false-name charge is a lesser-included offense to theft of identity, and the evidence in this case supported an instruction on both charges. Furthermore, we agree that the trial court erred when it allowed the Commonwealth Attorney to testify why he charged Stephenson with theft of identity rather than giving a false name. Therefore, we must vacate his convictions for theft of identity and PFO I, and remand this matter for a new trial.

The charges in this case arose from a traffic stop which occurred on April 2, 2015. Prior to the stop, Covington Police Officer Gideon Craymer was observing two residences when he noticed someone sitting in a vehicle parked in front of one of the residences. Officer Craymer saw a person make several trips from the house to the car, confer with the individual inside, and then return to the house. On his last trip out, the second individual handed something to the passenger, then got in the vehicle and drove away. Officer Craymer later identified Stephenson as the passenger, and Raymond Klette as the driver and the person making trips to and from the house.

As the vehicle drove away, Officer Craymer saw it make a turn without signaling. He contacted another officer, Officer Justin Schmidt, to stop the

vehicle. Officer Craymer arrived shortly thereafter. After stopping the vehicle, Officer Schmidt asked the occupants to identify themselves. While Klette accurately identified himself, Stephenson identified himself as David Randle Reeves, and gave a birthdate of February 1, 1981.

The officers became suspicious because Stephenson hesitated before giving the birth year. In addition, Officer Craymer was unable to locate any information for a person named David Randle Reeves with a birthdate of February 1, 1981. Officer Craymer warned Stephenson that giving a false name was a crime, but Stephenson again provided the same name and gave a partial social security number.

Upon determining that Stephenson was lying, Officer Craymer removed Stephenson from the car and placed him under arrest. At that point, Stephenson gave Officer Craymer his true name and birthdate. Stephenson told Officer Craymer that David Reeves is his brother, but he was not sure of the birth year. Stephenson also explained that he gave the false name because he had an outstanding arrest warrant.

During a search of the vehicle, the officers found a bag and a spoon with cocaine residue. Stephenson and Klette were both charged and jointly tried on the charges of possession of a controlled substance and possession of drug paraphernalia. The trial court denied Stephenson's request to instruct the jury on the offense of giving a false name to a peace officer in addition to the instruction

on theft of identity. Stephenson first argues that he was entitled to the instruction because giving a false name is a lesser-included offense to theft of identity.

The Commonwealth responds that Stephenson failed to preserve this specific issue. We disagree. Stephenson's counsel tendered an instruction on giving a peace officer a false name. Counsel asked the court for the instruction in addition to the identity-theft charge. While counsel did not use the term "lesser-included offense," the court interpreted it as such, holding that giving a false name is not a lesser-included offense to identity theft. We conclude that Stephenson adequately preserved the issue for appeal. RCr[1] 9.54(2)

In denying the requested instruction, the trial court relied on *Crouch v. Commonwealth*, 323 S.W.3d 668 (Ky. 2010). In *Crouch*, the defendant was charged with identity theft, but moved to amend the charge to giving a peace officer a false name. Our Supreme Court held that a trial court lacks jurisdiction to change a valid indictment except as provided by RCr 6.16. The Rule permits a court to amend an indictment when an "additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Since amending the felony identity-theft charge to the misdemeanor charge of giving a false name to a peace officer would have resulted in the defendant being charged with an entirely different offense, the Court concluded that the trial court properly denied the motion to modify the indictment. *Id.* at 672.

[1] Kentucky Rules of Criminal Procedure.

However, the Court in *Crouch* was only addressing whether the trial court could amend the charge, and not whether the giving a false name to a peace officer is a lesser-included offense of identity theft. To that extent, *Crouch* is not controlling as to the issue presented in this case. Generally, alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. *Howell v. Commonwealth*, 296 S.W.3d 430, 432-33 (Ky. App. 2009), and *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006)). Therefore, we review without deference to the trial court's decision.

"A trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence." *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (citing *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000)). However, the fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser-included offense of the charged offense. *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense. *Roberts v. Commonwealth*, 410 S.W.3d 606, 610 (Ky. 2013).

In addition, lesser-included offenses are governed by KRS[2] 505.020(2) which provides, in pertinent part:

[2] Kentucky Revised Statutes.

> A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
>
> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

In making the determination, we primarily focus on the respective elements of the greater and lesser offenses. KRS 514.160 provides that a person is guilty of theft of identity of another:

> when he or she knowingly possesses or uses any current or former identifying information of the other person ..., such as that person's ... name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:
>
> . . . .
>
> (d) Avoiding detection. . . .

In contrast, the applicable version of KRS 523.110(1)[3] provided that:

[3] In 2016, the General Assembly amended KRS 523.110 to add clarifying language to the statute. Ky. Acts 2016, Ch. 98 § 2 (Eff. 7-15-16). The parties agree that the prior version of the statute is applicable to this case.

> A person is guilty of giving a peace officer a false name or address when he gives a false name or address to a peace officer who has asked for the same in the lawful discharge of his official duties with the intent to mislead the officer as to his identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense.

The Commonwealth notes that if the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the greater offense, but is simply a separate, uncharged offense. *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000) (citing *Commonwealth v. Day*, 983 S.W.2d 505, 509 (Ky. 1999)). The Commonwealth argues that the warning required by KRS 523.110(1) is an additional element of proof for giving a false name that is not required for identity theft. We disagree.

The wording of KRS 523.110(1) does not include the warning as element of the offense of giving a false name to a police officer. Rather, the warning is a prerequisite to bringing the charge. In *Crouch*, the Supreme Court held that the defendant was not entitled to a separate instruction on giving a false name to a peace officer because there was no evidence that the officer warned him that doing so would be a crime. *Crouch*, 323 S.W.3d at 674-75. Here, Officer Craymer gave Stephenson the required warning.

The Court in *Crouch* further held that the offense of identity theft requires that the defendant knowingly used another person's identifying information with the intent to represent himself as that other person to avoid

detection. *Id.* at 673. The elements of the offense are not met if the defendant merely provided another person's name, or birthdate, or a social security number, but the elements are satisfied if the defendant provided more than one item of another person's identifying information. *Id.* When viewed in this light, giving a false name is clearly a lesser-included offense because it requires the same or fewer elements of proof than identity theft.

In this case, Stephenson provided his brother's name to Officer Craymer, but could not correctly remember his brother's birthdate or full social security number. A jury could reasonably find that Stephenson intended to provide more than one item of his brother's identifying information to represent himself as that other person in order to avoid detection. On the other hand, the jury could also find that he failed to give more than one item of his brother's identifying information, since Officer Craymer could not identify Reeves from the information which Stephenson provided. Finally, the jury could find that Stephenson's actions merely amounted to an attempt to commit the greater offense. Either of these latter two conclusions would support a finding of not guilty as to the charge of identity theft, but guilty on the lesser charge of giving a false name to a peace officer.

Consequently, we must conclude that the trial court clearly erred in denying Stephenson's request for an instruction on the lesser-included offense of giving a false name to a peace officer. Therefore, we must vacate his convictions for theft of identity and PFO I and remand the matter for a new trial with proper

instructions. We will address the remaining issues to the extent that they may arise at a new trial.

Even if we did not vacate the conviction on the previous issue, we would be compelled to find that the trial court abused its discretion in allowing the Commonwealth's Attorney to testify. At trial, Officer Craymer testified about the circumstances surrounding the traffic stop and Stephenson's arrest. On cross-examination, counsel asked Officer Craymer what crime he had initially charged Stephenson. Officer Craymer replied that he had charged him with giving a false name to a peace officer. The Commonwealth objected to the testimony, arguing that the testimony was irrelevant and misleading to the jury. The trial court sustained the objection. The trial court sustained the Commonwealth's objection again when counsel attempted to ask a similar question on re-cross examination.

But prior to the close of the Commonwealth's case, the prosecutor called Kenton County Commonwealth's Attorney Rob Sanders to testify regarding the charge of theft of identity. Defense counsel objected because the testimony was irrelevant, was based upon hearsay, and would unfairly bolster another witness's testimony. The trial court overruled the objection and allowed Sanders to testify.

Sanders testified that his office charged Stephenson with theft of identity because he believed that Stephenson had been undercharged in the original citation and that his conduct more closely fit the felony offense. He also stated his opinion that the offense of giving a false name occurs when the defendant gives a

fictitious name, rather than the name of a known person. Finally, Sanders testified that he believed Stephenson was guilty of identity theft because Stephenson provided his brother's full name, and his brother's correct birth month and day.

As a general rule, a witness cannot testify to conclusions of law. *Tamme v. Commonwealth*, 973 S.W.2d 13, 32 (Ky. 1998). Furthermore, it is improper for a witness to express an opinion as to the defendant's guilt. *Nugent v. Commonwealth*, 639 S.W.2d 761, 764 (Ky. 1982). The question of guilt or innocence is a matter for the jury to decide, and an expert's opinion that the defendant is guilty is not relevant to that inquiry. *Stringer v. Commonwealth*, 956 S.W.2d 883, 889-90 (Ky. 1997). Likewise, the definition of the offense of giving a false name would be a matter for the jury instructions, and not the opinion of the Commonwealth's Attorney. *Padgett v. Commonwealth*, 312 S.W.3d 336, 351 (Ky. 2010). We also note that it is generally improper for a prosecutor to testify as a witness. *See Holt v. Commonwealth*, 219 S.W.3d 731, 735-38 (Ky. 2007). Sanders's testimony clearly encroached on all of these matters.

The Commonwealth responds that Stephenson opened the door to this inquiry by asking Officer Craymer about the original charge. But as noted above, the trial court sustained the Commonwealth's objections to the questions. Any unfair prejudice could have been cured with an admonition, rather than the admission of opinion testimony that was clearly improper. And, as we noted above, the evidence that Stephenson was guilty of identity theft was not overwhelming. We find that Sanders's opinions concerning the scope of the false

name and identity-theft statutes were unfairly prejudicial to Stephenson. Therefore, we conclude that this testimony should not be permitted during retrial.

Finally, Stephenson argues that Officer Craymer improperly testified about an uncharged crime. On cross-examination, Officer Craymer testified that, when Stephenson got out of the car, he reached toward his lower back and "probably dropped something on the ground that I was not able to locate." Counsel objected, arguing that the testimony implied that Stephenson had engaged in tampering with physical evidence. The trial court denied the motions for an admonition or for a mistrial. On re-direct examination, Officer Craymer stated, "I can't say for sure, but I suspect that he dropped something."

While we do not approve of the testimony, we cannot find that Stephenson was unfairly prejudiced by this evidence alone. Officer Craymer did not suggest what he believed that Stephenson dropped, nor did he directly imply that it was illegal. Nevertheless, we agree that the evidence was not relevant to the charged offenses. On retrial, we trust that the parties will avoid this matter.

Accordingly, we vacate Stephenson's convictions for theft of identity and PFO. We remand this matter to the Kenton Circuit Court for additional proceedings, including a new trial as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen J. Buck
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky