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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001154-DG

JOHN P. ROTH, JR. — APPELLANT

v.

ON DISCRETIONARY REVIEW
FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, JUDGE
ACTION NO. 14-XX-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION REVERSING
AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

CLAYTON, JUDGE: John Roth was convicted of one count of Second-Degree Cruelty to Animals. KRS[1] 525.130. He appealed his conviction to the Campbell County Circuit Court, which affirmed the judgment and sentence. We granted

[1] Kentucky Revised Statutes.

discretionary review and now reverse and remand for entry of a directed verdict of acquittal.

BACKGROUND

Roth owned a 30-acre farm. Many months before any animal cruelty charges were brought against Roth, he purchased four horses as a gift for a person who would soon become his ex-girlfriend. Having no familiarity with caring for horses, Roth then hired Johnhetta Burke to care for his ex-girlfriend's horses. Roth purchased supplies, paid for veterinary visits, and provided hay for the horses, but he otherwise entrusted their care to Burke. Roth eventually sold or gave two of the horses to Burke. All four horses were housed on Roth's farm, and they had access to a 20-acre parcel on which to graze and drink water. The parcel even had an additional shelter away from the barn that the horses could go to when it rained.

Roth was then severely injured when his car was hit by a semi-truck. Roth suffered severe spinal injuries that required him to be in the hospital and in rehabilitation for several weeks. Burke continued to care for all four of the horses, even paying for food and veterinarian bills out of her own pocket while Roth was away from the farm. Once Roth was finished with rehabilitation and returned to the farm, he decided to get rid his ex-girlfriend's remaining horses, so he placed an advertisement on Craigslist. He included pictures of the horses; they were visibly skinny. Someone saw the advertisement and contacted animal control about the underweight horses.

On July 29, 2013, Ashley Stinson, an animal control officer for the Campbell County Animal Shelter, visited Roth's property. She viewed all four horses while they were in their stalls. The horses were underweight. The stalls were dirty, there was hay on top of feces, and the water contained foreign material. Though dirty, Stinson admitted the stalls were acceptable. Stinson was aware that Burke was being paid by Roth to take care of the horses. Furthermore, Stinson found out that Roth originally bought the four horses for his girlfriend. He later gave two of the horses to Burke. Burke was caring for all four horses, including the two that belonged to her. Stinson left a notice on the property informing Roth that the horses needed to be checked out by a veterinarian.

A few weeks later, a neighbor called police to report that the horses on Roth's property were underweight. Sergeant David Halfhill of the Campbell County Police Department visited the property on August 26, 2013. Halfhill had dispatch call animal control, who, in turn, sent Stinson to the farm. Stinson explained to Halfhill that it was her second time on the property. Prior to Stinson's arrival, Halfhill corralled all the horses in the barn and closed the gate so Stinson could view them. The horses had been grazing in the field. Halfhill believed the horses looked skinny, though he admitted he had little experience with horses.

Stinson testified that the horses were in noticeably worse condition, as they were skinnier than they were before. The stalls still contained feces, and the water was dirty. Stinson admitted that the more horses are fed, the more they

defecate. Stinson did not ask Burke how often she cleaned the stalls. Stinson left another notice on the property.

Halfhill talked to Burke, who was at the scene. Burke told Halfhill that she was being paid to take care of the horses and that she owned two of the horses. She indicated she was doing the best with the money she had to take care of the horses. Halfhill then obtained a search warrant, which was executed the following day. The horses were removed on August 27, 2013. Stinson took one of the horses. Nearly a year later, that horse had gained a few hundred pounds.

Stinson admitted that she could not say that Roth intentionally did anything to harm the horses between July 29 and August 26. She understood Roth was injured during that time, but she believed someone should have checked on the horses to ensure that they were doing well. When confronted with the fact that Roth paid Burke to take care of the horses, Stinson claimed that Burke did not appear to have the experience she needed to take care of horses.

On a later date, Halfhill talked to Roth on the telephone. Roth informed Halfhill that he had purchased the horses for his girlfriend, who is now an ex-girlfriend. Halfhill said Roth said he "didn't give a shit about those horses, they're his ex-girlfriend's horses, uh, and he said he's paying [Burke] to take care of the horses, it's her responsibility."

When pressed about whether Roth had done anything to intentionally harm the horses, Halfhill could only state that he believed Roth's "non-supervision" of Burke constituted an intentional act of animal abuse.

Burke then testified. She began working for Roth in January of 2013. Roth paid Burke eight dollars an hour to care for the horses. Roth also purchased food and supplies for the horses, and he paid the majority of their veterinary bills. Around June of 2013, Roth was involved in the car accident. While he was in the hospital, Burke bought the food for the horses and never asked for reimbursement. When he returned from the hospital and rehabilitation, he started purchasing the food again.

Roth told Burke to take care of the horses because he did not know how to take care of them. With little exception, Burke purchased for Roth whatever she needed to care for the horses. Roth told Burke that he wanted to sell the horses because he had no use for them and had purchased them for his ex-girlfriend's pleasure. Roth was not interested in keeping the horses. Burke said Roth would occasionally check on the horses, but left the day-to-day care up to Burke.

Burke, who had experience caring for horses, testified that she was doing the best she could to take care of the horses. She would have the veterinarian out regularly, and Roth paid all of those bills except for two. For example, in April 2013, when Burke began caring for the horses, one of the horses had asthma and another had something stuck in its foot, so she had the horses treated by a veterinarian. Roth paid the bill.

At some point, Burke told Roth that the horses were skinny. Burke recommended purchasing a more expensive, higher-protein food for the horses.

Roth would not purchase the higher-protein feed, but he did continue to purchase the cheaper feed for the horses. Roth would buy six or seven bags of food at a time and fill the deep freeze with food. Burke also wanted to purchase a round bale of hay for the horses. Roth did not purchase it, as he already had approximately 400 square bales of hay in the barn that she could use to feed the horses. He told her to keep feeding the horses and doing the best she could.

Burke would give each horse six pounds of food a day, and she thought they were putting on weight. Burke also gave the horses beet pulp, and she mixed corn oil into all four of the horses' food to help them put on weight. Burke would feed the horses twice a day. She kept a written schedule of her feedings, which indicated she gave each horse a three-pound scoop of sweet feed in the morning, and a three-pound scoop of sweet feed and a scoop of beet pulp mixed with corn oil in the evening. Burke had different-colored buckets for each horse to ensure that each horse got its own feed. She also had water buckets for each horse in its stall. There was also a cistern outside from which the horses could get water. She watered the horses every day. Burke admitted the barn was full of bales of hay for her to use.

Burke testified that one of the horses was 25 years old and had teeth problems, so he would have difficulties eating food and gaining weight, which was not uncommon. The other horses, Burke admitted, could stand to gain weight, but she claimed the horses had gained weight between July 29 and August 26.

In addition to what Burke fed the horses, the horses were also allowed to graze the land. The horses had access to the barn, a fenced-off area behind the barn, and 20 acres of land. The land had a running creek and water sources. It had a shelter at the top of the hill so the horses could get out of the weather if it began to rain. The barn was also kept open so the horses could return to it as they pleased.

Burke kept a calendar in the tack room. She used the calendar to keep track of when the horses needed to be wormed, when they needed to see the veterinarian, and when she was working so she could get paid the correct amount.

Burke would ride all four of the horses. She tried to ride them every day, weather permitting. She stopped riding the 25-year-old horse, though, as he was too skinny.

Prior to his accident, Roth helped Burke get all the hay and feed she wanted for the horses. He was physically capable of performing the actions and did perform the actions. After his accident, he no longer performed the actions because he was incapable of so doing. Burke stated that Roth never did anything intentionally or wantonly to cause the horses to suffer or go through any cruel or unusual treatment. Burke did admit that Roth once expressed to her that he would prefer to just shoot the horses, but Burke explained that the statement was out of aggravation due to "all these things that took place."

Burke had also been charged with animal cruelty. The charges were later dismissed. Burke claimed she did not know why the charges against her were dismissed.

At the close of the Commonwealth's proof, Roth moved for a directed verdict of acquittal. Among other elements that Roth claimed the Commonwealth failed to prove, Roth argued there was no proof that he acted intentionally or wantonly. The Commonwealth responded:

> I believe it's there. Inaction, when faced with what was going on with these horses, inaction is the same as, um, a negative action against these horses. He was, uh, presented with their condition and did nothing about these conditions. So, the inaction, where all he had to do was feed these horses more, I mean, take care of these horses, that's all he had to do. He refused to do so. I mean, I can *not* do something intentionally. Intentionally not do something, and then, to get a desired outcome.

The trial court denied the motion for a directed verdict for two primary reasons. First, Roth refused Burke's request for the more expensive feed. Second, though Roth had hundreds of square bales of hay, Roth would not purchase the round bale of hay at Burke's request. After Roth was in his car accident, he stopped getting the hay out of the barn for Burke and required Burke to get the square bales of hay out of the barn herself.

The jury found Roth guilty and recommended a 6-month jail sentence and a $500 fine. Roth appealed to the Campbell Circuit Court, which affirmed the conviction. Roth then sought and was granted discretionary review by this Court.

Having reviewed his conviction and the Campbell Circuit Court's opinion and order affirming the judgment and sentence, we reverse and remand for entry of a verdict of acquittal because the Commonwealth's evidence was insufficient to prove Roth acted with the requisite *mens rea*. As we are reversing and remanding for entry of a verdict of acquittal, we do not decide Roth's remaining issues as they will not occur on remand.

ANALYSIS

The standard of review for directed verdict motions is well established:

> 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). This standard requires the Commonwealth to produce "evidence of substance, and the trial court is expressly

authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham*, 816 S.W.2d at 187-88.

The directed-verdict question is controlled by the statutes creating the offense, not the jury instructions that were given. *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013). Thus, we turn to the statutes. A person commits second-degree cruelty to animals when he "intentionally or wantonly . . . [s]ubjects any animal to or causes cruel or injurious treatment through abandonment . . . [or by] failing to provide adequate food, drink, space, or health care, or by any other means[.]" KRS 525.130(1)(a). Proof of criminal intent requires evidence 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." KRS 501.020(1). And proof of wanton conduct must demonstrate that:

> A person acts wantonly with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

KRS 501.020(3).

In this case, there was neither a "mere scintilla of evidence" nor "evidence of substance" to prove that Roth acted intentionally or wantonly to subject the horses to cruel or injurious treatment. The undisputed evidence was

that Roth was attempting to care for horses that he did not even own. Two of the horses were owned by Burke, and the other two were owned by Roth's ex-girlfriend. Nonetheless, the horses remained on Roth's property, so he hired Burke to care for the horses. Roth paid substantial sums of money to Burke during their arrangement to care for all four horses. Roth also purchased feed, paid for veterinary visits, and provided hay for all four horses. Up until Roth was severely injured in the accident, Roth would occasionally see how the horses were doing and would help bring hay up to the barn. Presumably the horses were doing well and Burke was taking care of them up and until Roth was severely injured, or, at the very least, there is no evidence to show that the horses were not doing well under Burke's care prior to Roth's accident. Thus, the evidence indicates that before Roth was injured he was reasonably relying on Burke to care for the horses.

After Roth's injury, though, the undisputed evidence is that Burke was the person caring for the horses. Indeed, two of the horses were hers. Roth then decided to get rid of the horses and attempted to do so by placing them on Craigslist. In spite of his desire to get rid of the horses, he continued to pay Burke to care for the horses, and he continued to pay for food for the horses – actions that indicate he was neither intentionally nor wantonly subjecting the horses to cruel or injurious treatment.

The trial court found significant that Roth would not purchase more expensive feed that had a higher protein content. This fact alone is not dispositive of whether Roth acted intentionally or wantonly. Roth continued to purchase feed

for the horses and continued to pay Burke to care for the horses and continued to pay the veterinary bills for the horses. From all outward appearances, Roth was acting to provide "adequate" food, water, shelter, and medical attention for the horses, which is all the statute requires. KRS 525.130(1)(a).

Indeed, substantial evidence was introduced that the horses were fed twice daily and that Burke had taken a measure – the addition of corn oil to the horses' feed – to attempt to add weight to the horses. And while the evidence showed that the horses were skinny, the Commonwealth did not put forward any evidence that the horses were being wantonly or intentionally starved or wantonly or intentionally being treated cruelly and injuriously. At minimum, the evidence proved that Roth was intentionally attempting to provide "adequate" food, water, shelter, and healthcare for the horses. KRS 525.130(1)(a).

The instant case is akin to *Ison v. Commonwealth*, 271 S.W.3d 533 (Ky. App. 2008), wherein a panel of this Court reversed and remanded convictions for first-degree assault, first-degree wanton endangerment, and reckless homicide because the Commonwealth failed to prove wanton or reckless conduct. In that case, the defendant was driving a high-powered vehicle on a rainy afternoon when he lost control of his vehicle, crossed into oncoming traffic, and collided with another vehicle. One person was injured and three others were killed. The vehicle the defendant was driving had rear tires that were extremely worn. The defendant had been driving at or below the speed limit and had safely negotiated a curve before losing traction. Neither the way the defendant drove the vehicle nor the fact

that he was driving on excessively-worn tires constituted wanton or reckless conduct. The judgment and sentence was reversed and remanded for entry of a directed verdict. *Id*. at 537-38.

Likewise, in *Commonwealth v. Mitchell*, 41 S.W.3d 434 (Ky. 2001), our state's highest court held that failure to secure a child in a restraint system alone was insufficient evidence of reckless behavior. There, a father had placed one child, unrestrained, in the front seat of his vehicle, and had placed his two other children in baby seats in the rear seat of the car. Neither baby seat was buckled or fastened to the back seat. The father then failed to yield the right of way to an oncoming pickup truck, resulting in a collision. One of the infant children was thrown from the car and died from her injuries. The Commonwealth charged the father with second-degree manslaughter, and he was convicted of reckless homicide at a jury trial. That conviction was reversed and remanded for entry of a directed verdict. The Court reasoned that even though failure to secure the child in a car seat that was properly attached to the automobile was a violation of KRS 189.125, simply violating that statutory requirement did not elevate the father's action to statutory recklessness. *Mitchell*, 41 S.W.3d at 435-36. Furthermore:

> . . . the Commonwealth presented no evidence to support its position that the conduct of the father was reckless other than the failure to secure the infant in a proper child restraint system. This conduct, standing alone, without any other evidence of recklessness is not sufficient to constitute the standard of recklessness required by KRS 507.050, which is a gross

> deviation from the standard of care that a reasonable person would observe in the situation.

Id. at 435-46 (citation omitted).

It is noteworthy that both *Mitchell* and *Ison* found the defendants' actions did not rise to the level of reckless behavior because criminal recklessness is a lesser *mens rea* than wanton behavior. To act recklessly, one must "fail[] to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." KRS 501.020(4). Conversely, to act wantonly one must be "aware of and consciously disregard[] a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(3).

In the instant case, the Commonwealth had to prove that Roth acted with a more culpable *mens rea* than the actors in *Mitchell* and *Ison*. Roth had to have, at minimum, acted wantonly, by being "aware of and consciously disregard[ing] a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(3). Having reviewed the proof the Commonwealth presented at trial, we hold that it was clearly unreasonable for a jury to find Roth acted wantonly or intentionally. Roth hired Burke to care for the horses. He paid for their food. He paid for their veterinary visits. He provided Burke with access to hundreds of bales of hay. He provided the horses with 20

acres of land upon which to graze. He provided multiple sheltering options for the horses. And he did all this in spite of the fact that he owned none of the horses – two of them belonged to his ex-girlfriend, and two of them belonged to Burke – and in spite of the fact that he was severely disabled by a serious motor-vehicle accident. If failing to properly secure a child in a car seat does not constitute reckless behavior, and if driving in the rain in a high-powered automobile that has rear tires that are openly and obviously dangerous does not constitute wanton or reckless behavior, then we cannot say under the circumstances presented here that Roth acted intentionally or wantonly. Thus, the trial court erred by not granting a directed verdict.

CONCLUSION

Because it was clearly unreasonable for the jury to find Roth guilty under the evidence presented by the Commonwealth, we REVERSE and REMAND for the trial court to enter a verdict of acquittal.

THOMPSON, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, DISSENTS without separate opinion.

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