

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001443-MR

SHELBY TURNER

APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 14-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: On July 18, 2014, a Lee County grand jury returned an indictment charging Shelby Turner with one count each of first-degree fleeing or evading police, receiving stolen property over \$500 and less than \$10,000, first-degree wanton endangerment, and being a persistent felony offender in the second degree (PFO II). Following a jury trial, Turner was convicted of first-degree

fleeing or evading, receiving stolen property over \$500, and second-degree wanton endangerment.

The trial court sent the jury out to deliberate on the sentencing and PFO phase. However, the jury returned with an inconsistent verdict, and the trial court declared a mistrial. Thereafter, the parties reached an agreement as to sentencing. The Commonwealth agreed to dismiss the PFO II charge, and recommended a total sentence of ten years' imprisonment. The trial court imposed the recommended sentence, and this appeal followed.

The charges arose from a series of events which occurred in April of 2014. On April 18, the Menifee County Sheriff's Office received a call regarding a burglary at the home of Curtis Fields in Menifee County. The caller reported that a 1995 Ford Ranger truck had been stolen from Fields's property. The vehicle was yellow in color, and the caller estimated that it was worth between \$500 and \$1000.

The Menifee County Sheriff's office listed the vehicle as stolen, and law enforcement in adjoining counties were advised to look for it. On April 21, Lee County Constable Glenn Creech observed a black Ford Ranger driving erratically and at high speed. Constable Creech followed the truck for about five to ten minutes, and thereafter activated his lights.

As the truck came out of the Moores Town Road area, it nearly struck Constable Creech's vehicle. Constable Creech continued the pursuit, and was soon

joined by Lee County Sheriff Wendell Childers. After jointly pursuing the truck for about ten minutes, they saw it strike a gas pump at a country store and come to a stop. The gas pump was knocked off its foundation and due to the smoke and dust, the officers were unable to see the driver.

Following the crash, Sheriff Childers and Constable Creech observed that the truck had been heavily damaged in the crash. They also noticed that it had been recently painted black over the original yellow. The truck's vehicle identification number matched the one reported stolen in Menifee County. Sheriff Childers walked around to the back of the store and saw boxes and a dumpster. Sheriff Childers found Turner inside the dumpster. He had severe injuries, and eventually had to be transported to University of Kentucky Hospital for Treatment. There were no other people in the vicinity.

Turner first argues that his convictions for first-degree fleeing and evading and second-degree wanton endangerment violated his rights against double jeopardy. Turner concedes that he did not preserve this claim at trial. However, a double jeopardy violation may be reviewed on appeal regardless of a failure to raise it in the trial court. *Brooks v. Commonwealth*, 217 S.W.3d 219, 221-22 (Ky. 2007), citing *Baker v. Commonwealth*, 922 S.W.2d 371 (Ky. 1996), overruled on other grounds by *Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky. 2008).

The Fifth Amendment to the United States Constitution and § 13 of the Kentucky Constitution each prohibit the Commonwealth from twice placing a person in jeopardy for the same offense. To determine whether convictions violate double jeopardy, Kentucky has adopted the test set out in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). See *Dixon v. Commonwealth*, 263 S.W.3d 583, 588-89 (Ky. 2008), and *Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky. 2003), overruled on other grounds by *Gray v. Commonwealth*, 480 S.W.3d 253 (Ky. 2016). See also KRS¹ 505.020, which codifies *Blockburger* test. In *Blockburger*, the United States Supreme Court held that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180 (citations omitted).

In *Brown v. Commonwealth*, 297 S.W.3d 557 (Ky. 2009), the Kentucky Supreme Court applied this test to determine whether a defendant was subjected to double jeopardy by convictions for first-degree fleeing or evading police and second-degree wanton endangerment. The Court analyzed the elements of each offense, set out in KRS 520.095(1) and KRS 508.070(1), respectively. The Court pointed out that first-degree fleeing or evading police contains proof of four

¹ Kentucky Revised Statutes.

facts that second-degree wanton endangerment does not. *Id.* at 562. On the other hand,

[s]econd-degree wanton endangerment, ... requires proof of no fact beyond first-degree fleeing or evading police. Both provisions are satisfied by proof of wantonly engaging in certain conduct which creates a substantial danger of serious physical injury to another person. For second-degree wanton endangerment, the conduct is general and open-ended; for first-degree fleeing or evading police, the conduct is specified as intentionally fleeing from police while operating a motor vehicle. It follows, therefore, that once the Commonwealth proved the specific conduct required to convict Appellant of first-degree fleeing or evading police, it necessarily proved the general conduct necessary to convict him of second-degree wanton endangerment, too.

Id.

The Court further noted that double jeopardy prohibits the Commonwealth from punishing a single episode as multiple offenses, but not from carving out a single episode from the most serious offense. *Id.* at 563, *citing Clark v. Commonwealth*, 267 S.W.3d 668, 678 (Ky. 2008), and *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996). But since the two offenses arose from the same set of operative facts, the Court concluded that the defendant's convictions for both offenses violated double jeopardy. *Id.* However, the Court found that the appropriate remedy was to vacate the misdemeanor conviction, leaving the felony conviction and sentence intact. *Id.*

The Commonwealth argues that *Brown* is distinguishable because there were different facts to support each charge. We agree. The second-degree

wanton endangerment charge was based upon Turner's attempt to strike Constable Creech's vehicle. The first-degree fleeing or evading charge was based upon Turner's actions in disobeying Constable Creech's direction to stop, by operating the truck in a reckless manner which created a substantial risk of injury to persons or property. As noted below, this charge included the risk created when the truck struck the gas pump. Although there was some overlap in these facts, we conclude that they were sufficiently distinct to support separate charges. Therefore, Turner's double jeopardy rights were not implicated.

Turner next argues that he was entitled to a directed verdict on the remaining charges because the Commonwealth failed to establish essential elements of first-degree fleeing or evading, second-degree wanton endangerment, and receiving stolen property over \$500. A directed verdict is appropriate if the Commonwealth has produced no more than a mere scintilla of evidence; if the evidence is more than a scintilla and it would be reasonable for the jury to return a verdict of guilty based on it, then the motion should be denied. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In reviewing a trial court's decision regarding directed verdict, we, like the trial court, must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth and assume that the evidence for the Commonwealth is true, reserving for the jury questions as to credibility and weight to be given to testimony. *Id.* A defendant is

entitled to a directed verdict only if, in light of all of this, “it would be clearly unreasonable for a jury to find guilt.” *Id.*

With respect to all three offenses, Turner first argues that there was no evidence showing that he was driving the stolen truck. He notes that neither Constable Creech nor Sheriff Childers could see the driver of the truck, and that he was not found in the truck after the crash. But as noted above, Turner was found hiding near the crash site, and there were no other people in the area. In addition, Turner had recent and severe injuries which were consistent with being in an automobile accident. This circumstantial evidence was more than sufficient to support the jury’s conclusion that Turner was driving the truck.

Turner next argues that the Commonwealth failed to prove an essential element of first-degree fleeing or evading. Turner asserts that his actions in knocking the gas pump off its base did not create a substantial risk of injury or death because there was no evidence that it created a risk of a fire or an explosion. However, the first-degree fleeing or evading may be proven by one of several aggravating factors, including when, “[b]y fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property;...” KRS 520.095(1)(a)4.

“A substantial risk is a risk that is ample, considerable in degree or extent, and true or real, not imaginary ... [and] not every hypothetical scenario of ‘what might have happened’ represents a substantial risk.” *Bell v. Commonwealth,*

122 S.W.3d 490, 497 (Ky. 2003) (citations omitted). Turner's reckless and erratic driving while fleeing from the officers clearly created a substantial risk of serious injury to persons or property. See *McCleery v. Commonwealth*, 410 S.W.3d 597 (Ky. 2013), *Crain v. Commonwealth*, 257 S.W.3d 924 (Ky. 2008), and *Lawson v. Commonwealth*, 85 S.W.3d 571 (Ky. 2002). Indeed, crashing into the gas pumps created an actual injury to property even if there was no specific risk of a fire or an explosion. Under the circumstances, the trial court did not err by denying Turner's motion for a directed verdict on this issue.

Turner next argues that he was entitled to a directed verdict on the charge of receiving stolen property because there was no evidence that the value of the truck exceeded \$500. We agree with Turner that the Commonwealth had the burden of proving the market value of the stolen truck at the time and place it was taken. *Commonwealth v. Reed*, 57 S.W.3d 269, 270 (Ky. 2001). While the owner of the truck did not testify at trial, he reported to police that the truck was worth between \$500 and \$1,000. Furthermore, the truck was operable at the time it was stolen. Although the evidence was not overwhelming, the jury could reasonably conclude that the truck was worth more than \$500. Consequently, the trial court properly denied Turner's motion for a directed verdict on this issue.

Finally, Turner argues that the trial court erred by denying his motion for a mistrial. Prior to *voir dire*, the trial court read the indictment to the panel, and included the PFO II count. The Commonwealth agrees that evidence of a prior

conviction is generally not admissible during the guilt phase of a trial. *Hayes v. Commonwealth*, 175 S.W.3d 574, 588 (Ky. 2005). Nevertheless, a mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. *Bray v. Commonwealth*, 68 S.W.3d 375, 384 (Ky. 2002) (overruled on other grounds by *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010)), citing *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993). “The error must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.” *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005), overruled on other grounds by *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). We review the trial court’s denial of a motion for mistrial for abuse of discretion. *Bray*, 68 S.W.3d at 383.

The trial court made a brief and inadvertent reference to the PFO II count while reading the charges to the jury panel. There was no reference to the nature of Turner’s prior convictions. In addition, the PFO II count was dismissed prior to final sentencing. While the reference was improper, we cannot conclude that it created a manifest necessity for a mistrial. Therefore, the trial court did not abuse its discretion by denying the motion for a mistrial.

Accordingly, we affirm the judgment of conviction by the Lee Circuit Court.

ALL CONCUR.

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