

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000532-MR

DANIEL ABNEY

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE CHARLES C. SIMMS III, JUDGE  
ACTION NO. 17-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Daniel Abney brings this appeal from a March 10, 2017, judgment entered by the Nelson Circuit Court upon a trial by jury adjudging him guilty of second-degree fleeing/evading police, resisting arrest, and sentencing him to six-months' imprisonment. We affirm.

On August 22, 2016, an employee of the Quickstop on Springfield Road in Nelson County, Kentucky, noticed a man, subsequently identified as Abney, approaching customers and asking them for a ride. The employee was

concerned for Abney and asked if he needed assistance. Abney responded that he needed a ride to Bowling Green, Kentucky. Upon further questioning by the employee, Abney acknowledged that for the last few nights he had slept outside behind the store. The Quickstop employee relayed this information to the store owner. The owner subsequently called police and reported the information his employee had told him. The owner also reported to police that Abney was currently in the store and was wearing a red shirt, plaid shorts, and no shoes.

Deputy Sheriff A. J. Lewis responded to the call from dispatch. As Deputy Lewis was en route to the Quickstop, he recalled that police were looking for a male subject “wanted out of Texas” fitting the description of Abney. When Deputy Lewis arrived at the Quickstop, he pulled up to the gas pump. He immediately noticed a man wearing a red shirt, plaid shorts, and no shoes exiting the Quickstop. Deputy Lewis identified himself as a deputy, attempted to approach Abney, and stated he just wanted to talk. After several failed attempts by Deputy Lewis to engage Abney in conversation, Abney took off running. The deputy ordered Abney to stop. Abney failed to do so, and a chase ensued. Deputy Lewis ultimately tackled Abney, and the two tumbled down an embankment. After the fall, Deputy Lewis lost his grasp upon Abney, and Abney ran away. Abney was subsequently arrested on January 11, 2017, after being indicted by the Nelson County Grand Jury.

Abney was indicted for the offenses of fleeing or evading police in the first degree (Kentucky Revised Statutes (KRS) 520.095) and resisting arrest (KRS

520.090). A jury trial ensued in March 2017. Abney was convicted of fleeing or evading police in the second degree (KRS 520.100) and resisting arrest (KRS 520.090). By judgment entered March 10, 2017, Abney was sentenced to a total of six months in the county jail. This appeal follows.

Abney generally contends the trial court erred by denying his motions for directed verdict upon both fleeing and evading police in the second degree and upon resisting arrest. For the following reasons, we disagree.

A trial court's ruling upon a motion for directed verdict is reviewed according to the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). When considering a motion for directed verdict, the *Benham* Court held that "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Id.* at 187. And, if the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that defendant is guilty, the motion for directed verdict should be denied. *Id.* For the purpose of ruling upon a motion for directed verdict, the trial court must assume the evidence presented by the Commonwealth is true, but must reserve for the jury questions as to the credibility of witnesses and the weight to be attributed to such testimony. *Id.* Upon appellate review, the proper test is whether considering all the evidence "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 (citation omitted).

Abney asserts the trial court erred by denying his motion for directed verdict upon fleeing and evading police in the second degree as the Commonwealth failed to prove the essential elements of KRS 520.100. Specifically, Abney maintains no articulable reasonable suspicion existed that a crime had been committed; thus, the Commonwealth failed to prove that he committed the offense of fleeing and evading police in the second degree.

Fleeing and evading police in the second degree is codified in KRS 520.100(1) and provides, in relevant part:

- (a) As a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person[.]

KRS 520.100(1)(a). KRS 520.100(1)(a) requires police to have an articulable reasonable suspicion that a crime has been committed by the person fleeing or evading. And, to determine whether the necessary articulable reasonable suspicion exists, “the reviewing court must examine the totality of the circumstances to see whether the officer had a particularized and objective basis for the suspicion.” *Commonwealth v. Marr*, 250 S.W.3d 624, 627 (Ky. 2008).

At trial, the Commonwealth presented sufficient evidence for the jury to find that Deputy Lewis possessed an articulable reasonable suspicion that Abney had committed a crime. Deputy Lewis testified that the description he was given of Abney matched the description of a man “wanted out of Texas.” This fact,

combined with Abney's unprovoked flight from Deputy Lewis, created the requisite reasonable, articulable suspicion. *See Illinois v. Wardow*, 528 U.S. 119, 123 (2000). Therefore, we do not believe the trial court erred by denying Abney's motion for directed verdict upon the charge of fleeing and evading police in the second degree.

Abney also argues the trial court erred by denying his motion for a directed verdict of acquittal upon the offense of resisting arrest. More particularly, Abney asserts that his alleged conduct "amounted purely to flight and passive resistance" and, thus, he did not commit the offense of resisting arrest. Abney's Brief at 11. Therefore, Abney maintains the motion for directed verdict should have been granted.

As Abney did not move for a directed verdict on the offense of resisting arrest at trial, he has requested review of the issue under the palpable error standard of Kentucky Rules of Criminal Procedure (RCr) 10.26. Pursuant to RCr 10.26, a palpable error occurs if a defendant's substantial rights are affected and manifest injustice occurs. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006).

Resisting arrest is defined in KRS 520.090(1) and provides as follows:

- (1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:
  - (a) Using or threatening to use physical force or violence against the peace officer or another; or

- (b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

At trial, the evidence demonstrated that Abney fled, and Deputy Lewis pursued him. Deputy Lewis tackled Abney in an area of tall grass but did not realize there was an embankment. When Deputy Lewis and Abney fell down the embankment, Deputy Lewis suffered minor injuries and Abney got up and continued to flee. Deputy Lewis was unable to catch up to Abney after the fall. From these facts, we think a reasonable jury could find that Abney intentionally prevented or attempted to prevent Deputy Lewis from effecting an arrest by creating a substantial risk of causing physical injury to the deputy. Thus, we conclude the trial court did not err by denying Abney's motion for directed verdict of acquittal as to the offense of resisting arrest, and no palpable error occurred pursuant to RCr 10.26.

Abney also asserts that his conviction upon both fleeing and evading police and resisting arrest violates the double jeopardy clause of the Kentucky Constitution and the United States Constitution. However, Abney failed to preserve this issue below and again requests this Court to review the issue under the palpable error standard of RCr 10.26.

The constitutional prohibition against double jeopardy is a fundamental precept of our criminal justice system and is guaranteed by the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution. The prohibition against double jeopardy is premised upon the basic

principle that a criminal “defendant should not be twice tried or punished for the same offense.” *Commonwealth v. Gilliam*, 425 S.W.3d 918, 920 (Ky. App. 2014) (citing 22 C.J.S. *Criminal Law* § 265 (2014)). To determine if the prohibition against double jeopardy is violated, we apply the standard enunciated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932); accord *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1997). *Blockburger* held that double jeopardy is not violated where “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.’” *Burge*, 947 S.W.2d at 809 (quoting *Blockburger*, 284 U.S. 299, 304). Simply stated, double jeopardy is not implicated if each crime requires proof of an element that the other does not. *Id.*

It is apparent from a comparison of fleeing and evading police (KRS 520.100) and resisting arrest (KRS 520.090) that each of these offenses requires proof of an additional fact that the other offense does not. *See Burge*, 947 S.W.2d at 809. Under KRS 520.100, fleeing and evading police requires proof that a person disobeyed a direction from police to stop and then the person fled. Conversely, under KRS 520.090, resisting arrest requires proof that the person prevented or attempted to prevent police from effectuating an arrest. Accordingly, fleeing and evading police and resisting arrest both require proof of a fact that the other does not. Therefore, we do not believe that the convictions upon both fleeing and evading police and resisting arrest violated Abney’s double jeopardy rights.

For the foregoing reasons, the judgment of the Nelson Circuit Court is

affirmed.

ALL CONCUR.

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