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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000283-MR

BRIAN DECKER

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 14-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Brian Decker brings this appeal from a Grayson Circuit Court judgment after he was convicted of three counts of assault in the first degree. He argues (1) the trial court erred in failing to suppress self-incriminating statements he made to emergency medical personnel and (2) the evidence at trial was insufficient to sustain his convictions.

The charges against Decker stemmed from a traffic accident which occurred on Highway 259 in Grayson County on January 11, 2014. Decker was driving southbound at approximately 8:47 in the evening. His wife was in the front passenger seat of the car and her two children, who were three and six years of age, were in the back seat. Another motorist, Jonathan Kellog, observed Decker driving erratically and crossing the center line multiple times. Kellog tried to contact the police but had no cell phone service, so he honked and flashed his lights in an unsuccessful attempt to stop Decker. A short time later, Decker crossed the center line into the northbound lane and struck an oncoming SUV head on. Decker was ejected from his vehicle. The driver of the other vehicle and the two children in Decker's car were seriously injured. All the victims were ultimately airlifted to the University of Louisville Hospital.

While waiting for the arrival of emergency medical personnel, Decker lay on the pavement for approximately eleven minutes. According to Decker, he may not have been receiving sufficient oxygen during that time. When the paramedics arrived, he was going in and out of consciousness. The paramedics gave Decker oxygen and had to ask his birthdate three times before he was able to answer. They placed him on a stretcher and carried him to an ambulance to be transported to the helicopter. Deputy Bryan Hammons of the Grayson County Sheriff's Department overheard one of the paramedics ask Decker whether he had

used any legal or illegal drugs or consumed any alcohol. Hammons testified, based on his twenty-four years of experience as a part-time EMT, that this was a standard question in that type of situation to determine what treatments or medications were available and to avoid dangerous interactions. The paramedic also testified that this was a standard question asked of anyone with a head/trauma injury. Decker replied that he had smoked some marijuana a few hours earlier and consumed an unknown amount of alcohol about four hours before. Decker's blood was drawn and tested at the hospital, over four hours after the accident.

Decker was indicted for three counts of assault in the first degree; one count of assault in the fourth degree; one count of operating a motor vehicle under the influence of drugs or alcohol (aggravating circumstances); operating a motor vehicle on a suspended/revoked license; and failure to use a child restraint device in vehicle.

Decker filed a motion to suppress the analysis of his blood. The trial court ruled that the evidence related to the blood draw would not be suppressed but the Kentucky State Police analysis of the blood was inadmissible. The DUI charge, child restraint violation and the fourth-degree assault charge were dismissed prior to trial.

Decker also filed a motion to suppress the statements he made to the paramedic regarding his alcohol and marijuana use that were overheard by Deputy

Hammons, arguing he should have been advised of his right to remain silent and that the statements were involuntary and false. Following a hearing at which Deputy Hammons testified, the trial court denied the motion on the grounds that Decker was not in custody when he made the statements to the medical personnel.

At trial, Decker's defense counsel made a motion for directed verdict which was denied. The jury convicted Decker of three counts of assault in the first degree and operating a motor vehicle on a suspended/revoked license. He was sentenced to a total of ten years' imprisonment. This appeal followed.

Decker argues that the trial court should have suppressed the statements he made to the paramedics on the grounds they were obtained in violation of his Fifth Amendment right against self-incrimination and Fourteenth Amendment right to due process.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

“*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), requires police officers to advise suspects of their rights against self-incrimination and to an attorney prior to subjecting them to custodial

interrogation.” *Greene v. Commonwealth*, 244 S.W.3d 128, 135 (Ky. App. 2008).

Consequently, “only statements made during custodial interrogations are subject to suppression pursuant to *Miranda*.” *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006), *as amended* (Mar. 29, 2006). Custodial interrogation is defined

as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. . . . The inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest. Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.

Commonwealth v. Lucas, 195 S.W.3d 403, 405-06 (Ky. 2006) (citations omitted).

Decker claims that he was in custody at the time he made the incriminating statements regarding his drug and alcohol use because the paramedics treating him were state actors, and he was not free to leave because of his serious medical condition following the accident. He claims the paramedic’s questioning under these circumstances was inherently coercive and rendered his responses involuntary.

The Commonwealth contends that Decker's argument is unpreserved. The record of the suppression hearing shows that, following Deputy Hammons's testimony, defense counsel unambiguously conceded upon questioning by the trial court that Decker was not in custody when he made the self-incriminating responses to the paramedic's question. Decker claims that defense counsel's concession was limited to merely acknowledging that the police had not taken official custody of Decker. He contends his argument is preserved because the defense met its burden simply by moving to suppress the statement as a violation of the Fifth Amendment under *Miranda* and is now refining its claim on appeal by arguing the paramedics qualified as state actors and his freedom was restricted. He argues that it defies logic to suggest the burden is on the defense to make every nuanced argument as to why evidence is not admissible.

But Decker's current argument that the paramedics were state actors is more than a nuanced version of his earlier claim; it constitutes a new theory of error which "cannot be raised for the first time on appeal." *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). Decker's argument that the paramedics were state actors was never raised before the trial court and consequently the trial court was never able to make any findings regarding their role or whether Decker's freedom was restricted by them in such a way as to constitute custody for purposes of the Fifth Amendment. Nor does Decker request

palpable error review. “Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to [Kentucky Rules of Criminal Procedure] RCr 10.26 unless such a request is made and briefed by the appellant.” *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). Because we do not believe such extreme circumstances exist in this case, we will not review this argument for palpable error.

Next, Decker argues that he was entitled to a directed verdict on the charges of assault in the first degree because there was insufficient evidence he possessed the requisite mental state of wantonness to sustain his convictions.

In considering a motion for a 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). “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.” *Id.* at 187. The evidence presented by the prosecution must be more than a mere scintilla. *Id.* at 188.

The jury instructions on assault in the first degree required a finding that Decker wantonly engaged in conduct which created a grave risk of death to another under circumstances manifesting extreme indifference to the value of human life. The instructions defined “wantonly” in accordance with Kentucky Revised Statutes (KRS) 501.020(3), as a person acting “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.”

The following evidence was introduced to support a finding of wantonness:

First, evidence was presented of Decker’s erratic driving. Jonathan Kellog, the driver who witnessed the accident, testified that he was traveling behind Decker for ten to fifteen minutes and saw him “swerving all over the place” and crossing the center line “several, several times.” When Kellog was unable to contact the police, he began to honk his horn and flash his lights at Decker’s car, to no avail whatsoever. When Kellog saw Decker was not going to stop, he backed

off because he realized Decker was going to cause an accident and he did not want to be part of it. Mark Seabolt, the driver of the SUV hit by Decker, testified that he saw Decker's headlights coming towards him, moving back and forth. He moved his vehicle off the road three to four feet in an attempt to evade Decker's car but it nonetheless came across to Seabolt's side of the road and struck him.

Second, evidence was presented that the two children in Decker's car were not properly restrained. Kellog helped to get the little boy out of the car following the accident. He testified the boy was not in any type of car seat or restrained in any way and was standing on the back seat reaching for him. The girl was in a booster seat but had only a lap belt around her waist; the shoulder strap was behind her. James Brooks, who lived nearby and came to assist at the accident scene, also observed the little boy had no booster seat and that the girl was in a booster seat but with the shoulder strap behind her back. Bennie Baxter, one of the paramedics on the scene, testified that the little girl was slumped over and barely breathing, restrained by a lap belt only. The little boy testified that he recalled having a seat belt only around his waist prior to the accident and no car seat. He stated that he typically sat in a booster seat when driving with other family members and wore a seat belt around his waist and chest on those occasions.

Third, evidence was presented of Decker's alcohol and drug consumption. When asked by the paramedic whether he had consumed any

alcohol or drugs in the last 24 to 48 hours, Decker responded that he had smoked marijuana a few hours earlier and consumed an unknown amount of alcohol about four hours before. The paramedic testified he could smell alcohol on Decker's breath and that he had slightly slurred speech and was confused as he came in and out of consciousness.

Fourth, evidence was presented that Decker was driving on a suspended license. Chris Sharp, a hearing officer with the Kentucky Transportation Cabinet, testified that Decker did not have a valid license on the date of the accident. It had been suspended two months before.

Decker points to alleged flaws and weaknesses in the evidence. But his criticisms address the probative value of each piece of evidence in isolation, whereas we are required to view the evidence in its totality. *Doneghy v. Commonwealth*, 410 S.W.3d 95, 102 (Ky. 2013). So, for instance, Decker argues that his failure to use shoulder belts to restrain the two children did not support a finding of wantonness because, under the version of KRS 189.125 in effect at the time of the accident, the failure to use a child passenger restraint system or a child booster seat could not be considered contributory negligence nor be admissible as evidence in a civil trial. He also relies on *Commonwealth v. Mitchell*, 41 S.W.3d 434 (Ky. 2001), in which the Kentucky Supreme Court held that the failure to secure an infant in the proper child restraint system is insufficient to prove

recklessness, a lesser level of *mens rea* than wantonness. But the *Mitchell* court did not suggest that failure to secure a child in the proper restraint system could never be used as evidence of criminal *mens rea*. It simply stated that such evidence was insufficient when standing alone without any other evidence.

Mitchell, 41 S.W.3d at 435-36. No one is claiming that Decker's failure to restrain the children properly was sufficient evidence, on its own, to support a finding of wantonness. It was a piece of evidence to be considered in conjunction with all the other evidence of Decker's impairment and his erratic and dangerous driving. Viewing the evidence as a whole, it was not unreasonable for the jury to find Decker guilty of the charged offenses and the trial court did not err in denying the motion for a directed verdict.

For the foregoing reasons, the final judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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