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# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-001055-MR

WILLIAM MADDEN — APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 15-CR-00017

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: An Allen County Circuit Court jury convicted William Madden of third-degree assault, first-degree criminal mischief, and being a first-degree persistent felony offender. Madden now appeals from these convictions, and raises four issues: (1) the trial court erred when it failed to timely follow the procedures required by *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); (2) Madden suffered undue prejudice when the trial

court denied his motion for a continuance on the eve of trial; (3) the trial court erred when it denied Madden's motion for a directed verdict after the Commonwealth's case-in-chief; and (4) the trial court's denial of a missing evidence instruction was unduly prejudicial. For the following reasons, we affirm the trial court on each of the foregoing issues.

## BACKGROUND

The convictions from which Madden now appeals arose from events which took place on November 6, 2014, in which Madden, who was at that time incarcerated at the Allen County Detention Center, purportedly broke a window of his cell door and spit on a corrections officer. At Madden's two-day trial, the Commonwealth called three witnesses to the incident: Deputy Jailers Kenneth Pardue, Angela Payne, and Nick Pierce, as well as the Allen County Jailer, Larry Piper.

Deputy Pardue testified that he was in the detention center's control room with Deputy Payne when the incident began. The deputies had just finished nightly "store call," where inmates are sold phone cards and other items. Madden was in a cell with approximately four or five other inmates, and such cell was around forty feet from the control room. The cell contained two rooms where the inmates sleep known as "pods," as well as a day room or foyer-type area in front of the pods.

Both Deputy Pardue and Deputy Pierce testified that they sold Madden a phone card during store call, but Madden called the control room from a speaker in the cell demanding another phone card. The deputies declined, as they had completed store call for the evening. Deputy Pardue testified that Madden got extremely angry and started "hollering, raising hell, [and] beating on the door." Madden was the only individual whom Deputy Pardue could hear. Subsequently, both Deputy Pardue and Deputy Pierce heard one "loud pop." At that point, Deputy Pardue walked to the cell, which he estimated took roughly thirty seconds, and saw that the glass in the door had been shattered. He also saw Madden standing in the day room area of the cell, alone, between the door and the shower area. At that point, Deputy Pardue testified that he did not know what had caused the damage to the door, as Madden could not have broken it with his fists and everything else in the cell was bolted down.

Deputy Pardue returned to the control room and retrieved Deputy Pierce, and both deputies went back to the cell, where Deputy Pierce testified that Madden was the only inmate in the foyer area that he could see. Both deputies testified that Madden was mad, pacing, and using foul language, and all the other inmates were in the pods with the doors closed. The deputies called dispatch, and once the police arrived, Madden was removed from the cell, placed in a restraint chair, where he was strapped down at his feet, arms, waist, and shoulders, and

moved to a separate room with the door open. Madden's head and neck remained free. Both deputies testified that Madden was calm while he was being placed in the restraint chair, but once the police left, he became angry again and continued to "raise hell." The deputies further testified that none of the other inmates came out of the pods until Madden was removed from the cell.

Deputy Pardue and Deputy Pierce returned to the cell later to investigate and discovered that the showerhead, although not out of place, was the only item in the cell that could have been removed and that was solid enough to break the glass. The showerhead was not damaged, but it was solid metal and matched the hole in the glass. The showerhead was photographed, but no fingerprints were taken.

Later that evening, Deputy Pierce went to check on Madden in the restraint chair. Madden continued to be verbally abusive and extremely angry. Deputy Pierce testified that he walked up behind Madden and looked over him. At that point, Madden moved his head back and spit upwards. Deputy Pierce jumped back to avoid the spit hitting his face, but it landed on his shirt. Deputy Pierce showed Deputy Pardue and Deputy Payne the spit before washing it off. The deputies then put a "spit mask" on Madden to avoid any further incidents.

Jailer Piper testified that it cost $2,163.62 to fix the broken window. The jury convicted Madden of third-degree assault, first-degree criminal mischief,

and being a persistent felony offender in the first degree and imposed consecutive ten-year sentences. Thereafter, the trial court imposed the jury's verdict but ordered the sentences to run concurrently. This appeal followed.

Further facts will be developed as required to address the specific issues presented.

ANALYSIS

## I. *FARETTA* HEARING

Madden first argues that the trial court failed to timely establish whether his waiver of representation was made knowingly, intelligently, and voluntarily as required by *Faretta*. At Madden's arraignment hearing on April 21, 2015, Madden informed the court of a conflict with his court-appointed counsel, Mr. Roemer. The following exchange occurred between Madden and the trial court:

> Court: At this time, you are before this court for arraignment. Are you requesting that the court appoint an attorney to represent you, sir?
>
> Madden: Um. I think I've made it apparent before that I don't approve of Mr. Roemer. I have a conflict with him, so if that's who you intend on appointing me, I'm afraid I can't accept his counsel.
>
> Court: So the alternative, sir, is that, do you desire to represent yourself?
>
> Madden: No.

Court: Well, you can't have it both ways, Mr. Madden. You can either have a court-appointed attorney, which is Mr. Roemer, or you can represent yourself, sir.

Madden: Well, as I said, I have a conflict with Mr. Roemer. If my only other option is to represent myself, then that's what I'll do.

Court: Alright, and so then Mr. Madden, can you tell me have you ever studied law before?

Madden: I've read some law books.

Court: Okay. Have you ever represented yourself in any other criminal matter before, sir?

Madden: I've requested to, but I never have.

Court: Do you realize that you are charged with two Class D felonies, assault third-degree on an inmate and criminal mischief first-degree, that if convicted as charged could be potentially enhanced to 20 years as a persistent felony offender, first-degree. Do you understand that, sir?

Madden: No, I believe I was charged with assault on a corrections officer.

Court: Alright, and so you've been charged with assault, third-degree. You've been charged with criminal mischief first-degree, both of which are Class D felonies which carry a minimum sentence of one year, a maximum sentence of five. You have also been indicted in the status offense of being a PFO first, which carries a maximum potentially-enhanced sentence of 20 years. Do you understand that, sir?

Madden: I haven't received any indictment.

Court: I'm getting ready to give that to you, sir. I'm simply making sure that you understand, uh, the potential risks that you have in representing yourself, sir.

Madden: I do.

Court: And so you understand you're looking at another 20 years, do you understand that?

Madden: I think you made a mistake on my last sentence.

Court: Well, I guess that will be up for the Court of Appeals to decide but in the meantime, sir, I'm asking you a straight-up question: do you understand that you're looking at 20 years if convicted as charged? I tell you what, you take my word for it on that one. Do you realize that ultimately you will be held to, uh, the same standard of conduct as any other practicing attorney in this court?

Madden: Yes.

Court: Are you familiar with the rules of evidence?

Madden: I've read over them.

Court: Do you then ultimately recognize that if you represent yourself, that you represent yourself at your peril, sir?

Madden: Could you repeat that?

Court: If you represent yourself . . . that the risk that you run ultimately in representing yourself is that, of course, you have not been trained in the law but ultimately will be held to the same standard, sir?

> Madden: I put it on the record that I have a conflict with Mr. Roemer. I understand what you're saying.
>
> Court: Alright.

At that point, Madden pled not guilty and requested a fast and speedy trial, which was set for July 23 and 24, 2015.

No other steps appear to have been taken in the case, other than a notice of discovery from the Commonwealth and a *pro se* request for a "review hearing" from Madden, until the trial court ordered a scheduling status conference "to address the issue of appointment of hybrid counsel in anticipation of the jury trial now scheduled on defendant's *pro se* oral motion for fast and speedy trial . . . ." The status conference was held on July 7, 2015, at which time the trial court informed Madden that it had misunderstood the reason for the conflict with his appointed counsel and had determined that there was such a conflict, as Mr. Roemer represented a possible witness whom Mr. Roemer might have to cross-examine at trial. The trial court asked Madden "are you requesting that the court, in fact, appoint conflict counsel for you, or is it your desire to represent yourself in this matter?" Madden responded "no, ma'am, I'd like you to appoint, uh, counsel." The trial court appointed Tim Hendrix to represent Madden in an order entered on July 9, 2015, and Mr. Hendrix made his entry of appearance on July 14, 2015. Through Mr. Hendrix, Madden withdrew his *pro se* request for a fast and

speedy trial, and the trial court continued the case so that Mr. Hendrix could prepare for trial. A trial date was ultimately set for February 11 and 12, 2016.

On February 4, 2016, Mr. Hendrix filed a motion to withdraw as counsel for Madden, citing irreconcilable differences. The trial court heard the motion on February 5, 2016, and declined to rule on Mr. Hendrix's motion to withdraw as counsel, but rather continued the case for 60 days. Meanwhile, on February 11, 2016, Madden filed a *pro se* "Supplemental Motion to Dismiss," which was overruled in an order dated March 7, 2016. Thereafter, Mr. Gregory Berry entered an appearance as counsel for Madden on March 15, 2016.

At a pretrial conference held on April 12, 2016, Madden requested to be hybrid counsel with Mr. Berry, stating "I'm going to request that this representation be hybrid counsel. That way, I'll be informed of everything that's going on in my defense and I will be able to file my own motions and such if I deem that they need to be filed and that way there won't be another conflict like there was with Mr. Hendrix." The trial court replied:

> Well, certainly, this court has previously recognized, Mr. Madden, that you have assumed some responsibility for your own representation and have filed some motions that this court has previously ruled upon. To the extent that you want to proceed in the role of hybrid counsel, that's certainly your prerogative to do so. I would encourage you, of course, to continue to consult with Mr. Berry.

The trial court further noted that "with respect to proceeding forward with pretrial motions, to the extent that you file a *pro se* motion, the court will give that due consideration." The court did warn Madden that his motions needed to be timely filed and would be held to the same standard as Madden's counsel or the Commonwealth. The court then stated it would review the hybrid counsel situation again for purposes of trial and would do a full-blown *Faretta* hearing "at some point down the road."

Madden continued to file *pro se* motions, including a motion to dismiss filed on April 20, 2016, a motion for recusal of the trial judge filed on April 21, 2016, a motion to suppress filed on April 21, 2016, as well as a reply to the Commonwealth's responses to his motions to dismiss and suppress on May 18, 2016. In Madden's motion to dismiss, he argued that he had not received a *Faretta* hearing at the preliminary hearing and that he had made an incriminating statement that was subsequently used against him when the case was presented to the Allen County grand jury.

The trial court held an evidentiary hearing on Madden's *pro se* motions, where Madden stated that he did not desire to represent himself on his *pro se* motions and requested that Mr. Berry argue those motions for him. Thereafter, the trial court denied Madden's motion to dismiss by an order dated September 26, 2016, but granted Madden's motion to suppress the statements made by him during

the preliminary hearing, finding that the lack of *Faretta* warnings during the preliminary hearing prejudiced Madden. Additionally, Madden filed his fourth *pro se* motion, a motion to dismiss, on October 12, 2016, which the trial court ultimately denied.

The trial court held a *Faretta* hearing on October 26, 2016, and issued an order finding that Madden's self-representation, or any form of "hybrid" representation he may choose, was knowingly, voluntarily, and intelligently made. At the end of the hearing, the trial was reset for, and was ultimately held on, March 16 and 17, 2017. Madden proceeded as hybrid counsel with Mr. Berry throughout the trial.

Turning to the applicable law in this case, both the Sixth Amendment to the United States Constitution and Section 11 of the Constitution of Kentucky contain the right of a defendant to assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 339-40, 83 S.Ct. 792, 794, 9 L.Ed.2d 799 (1963) and *Allen v. Commonwealth*, 410 S.W.3d 125, 133 (Ky. 2013). Associated with the state and federal constitutional right to assistance of counsel is the related right to waive counsel and represent oneself. *See Crawford v. Commonwealth*, 824 S.W.2d 847, 849 (Ky. 1992) (internal citations omitted) ("A defendant has an absolute right to waive counsel and to represent himself . . . ."). Additionally, pursuant to Section 11 of the Kentucky Constitution, unlike the United States

Constitution, "an accused may make a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified kind of services . . . ." *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974). Any abrogation of a defendant's right to self-representation is not subject to harmless error analysis. *Allen*, 410 S.W.3d at 144.

Before a defendant may proceed in either a *pro se* or "hybrid" counsel situation, the trial court must ensure that a defendant's waiver of counsel is knowingly, intelligently, and voluntarily made. *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541; *see also Commonwealth v. Terry*, 295 S.W.3d 819, 822 (Ky. 2009). *Faretta* requires that a defendant seeking self-representation be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541 (internal quotations and citation omitted). However, *Faretta* does "not require any specific form or magic words for there to be a knowing and voluntary choice to proceed pro se." *Depp v. Commonwealth*, 278 S.W.3d 615, 617 (Ky. 2009). On appellate review, "an appellate court examines the entire record to determine if a defendant's waiver of counsel was knowing, intelligent, and voluntary." *Terry*, 295 S.W.3d at 823 (citing *Depp*, 278 S.W.3d at 617-19).

Additionally, "courts indulge 'every reasonable presumption against a waiver of counsel.'" *Winstead v. Commonwealth*, 283 S.W.3d 678, 683 (Ky. 2009) (quoting *Buhl v. Cooksey*, 233 F.3d 783, 790 (3d Cir. 2000)). To overcome the presumption against waiver and proceed *pro se* or as hybrid counsel, "a defendant must clearly and unequivocally seek to represent himself." *Id.* (citing *Deno v. Commonwealth*, 177 S.W.3d 753, 757 (Ky. 2005)). "It is not enough to express dissatisfaction with counsel or to request different counsel; the defendant, rather, must unequivocally ask to proceed *pro se*." *Id.* (citing *Deno*, 177 S.W.3d at 758); *see also Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541 (defendant "clearly and unequivocally" stated that he wished to represent himself). "If a defendant unequivocally invokes his right to defend himself, the trial court is then obliged to conduct a [*Faretta*] hearing . . . ." *Winstead*, 283 S.W.3d at 683 (citation omitted).

Here, Madden does not argue that his waiver at the October 26, 2016 *Faretta* hearing was invalid. Rather, he argues that, from the date of his arraignment hearing on April 21, 2015, until the date of the *Faretta* hearing on October 26, 2016, he participated in the case in either a *pro se* manner or as hybrid counsel without the benefit of a *Faretta* hearing and was substantially prejudiced as a result. Alternatively, the Commonwealth argues that the conversation that took place between the trial court and Madden at Madden's arraignment qualified as a *Faretta* hearing, as the trial court properly warned Madden of the dangers of

self-representation and asked him a number of questions regarding whether he had studied law before, if he understood the charges and possible penalties, if he was familiar with the rules of evidence, if he understood that he would be held to the same standard as a practicing attorney, and if he understood that he represented himself at his own peril.

However, before we are required to determine whether the conversation that took place at Madden's arraignment constituted an adequate *Faretta* hearing, we must first determine whether Madden unequivocally requested to represent himself at that juncture. We can find no such unequivocal request. On the contrary, Madden stated that he did *not* want to represent himself. The conversation at Madden's arraignment was not an unequivocal request, but merely a request to proceed with conflict-free representation, which was thereafter remedied by the trial court with the appointment of Mr. Hendrix. Further, after the trial court confirmed that there was an actual conflict between Madden and Mr. Roemer, Madden maintained that he wanted appointed counsel. Finally, Madden took no appreciable *pro se* action in his case in the time period between the April 21, 2015 arraignment and Mr. Hendrix's entry of appearance on July 14, 2015. Because Madden did not unequivocally request to represent himself at his arraignment or in the months following, *Faretta* was not implicated.

Additionally, Madden did not invoke his right to proceed *pro se* or in a hybrid fashion by filing his *pro se* motion on February 11, 2016. The filing of a *pro se* motion is not a request to represent oneself. *Commonwealth v. Martin*, 410 S.W.3d 119, 123 (Ky. 2013).

Thus, the first date that we can ascertain from the record that Madden unequivocally requested to represent himself in a hybrid fashion was April 12, 2016. A *Faretta* hearing is required to proceed with an unequivocal request for hybrid representation. *St. Clair v. Commonwealth*, 319 S.W.3d 300, 311 (Ky. 2010). To fully invoke the protections of *Faretta* when a defendant "was granted his desired representation prior to trial," however, "the inquiry before this Court is whether Appellant was denied counsel at a critical stage of his prosecution." *Stone v. Commonwealth*, 217 S.W.3d 233, 238 (Ky. 2007). As stated in *Stone*:

> Thus, an analysis of a critical stage necessarily involves a retrospective inquiry as to the nature and consequences of each step in the proceedings. Particular attention must be given to how counsel would have benefited the defendant at these moments. In other words, was there the likelihood that representation by counsel would have benefited Appellant?

*Id*. "Unless it is shown that something prejudicial to the defendant occurred by reason of his lack of counsel at that stage, there has been no infringement of his fundamental rights." *Carson v. Commonwealth*, 382 S.W.2d 85, 95 (Ky. 1964).

Between April 12, 2016, the date upon which Madden unequivocally requested to be hybrid counsel, and October 26, 2016, the date of the *Faretta* hearing, Madden filed three *pro se* motions and one *pro se* reply. At the hearings on these motions, he was represented by Mr. Berry, who argued those motions for Madden. Madden took no *pro se* steps other than to file those motions. He did not argue those motions to the court and was in fact successful in having an incriminating statement made by him at the preliminary hearing suppressed through one of those *pro se* motions. We see no prejudice.

The circumstances in the case *sub judice* are similar to those in *Matthews v. Commonwealth*, where the Court noted:

> Unlike the defendants in . . . *Faretta*, and similar cases, [Appellant] did not participate as counsel at trial in front of the jury. He did not ask questions of the witnesses nor did he make opening or closing statements. His only participation upon being made co-counsel was to file pro se motions and, like other defendants, confer with his counsel. . . . No *Faretta* hearing was required in this circumstance.

168 S.W.3d 14, 23 (Ky. 2005). Similarly, under the circumstances presented here, *Faretta* has no application. As in *Matthews*, Madden's only participation as "hybrid" counsel was to file *pro se* motions and consult with his counsel. When it became apparent that Madden may want to participate as "hybrid" counsel for purposes of rejecting a plea offer from the Commonwealth and at his trial, the court held a full *Faretta* hearing. We can discern no error by the trial court.

## II. MOTION FOR CONTINUANCE

Madden next argues that he was unduly prejudiced when the trial court denied his March 13, 2017 motion, through counsel, for a continuance of his trial. As previously discussed, the trial court had first scheduled the trial for July 23 and 24, 2015 after Madden's *pro se* request for a fast and speedy trial. Thereafter, upon Madden's withdrawal of his request for a fast and speedy trial, the trial date was moved to February 11 and 12, 2016 to allow Mr. Hendrix adequate time to prepare. Although Mr. Hendrix and the Commonwealth announced on February 2, 2016 that they were ready for trial, Madden told the trial court that he did not think his counsel was adequately prepared for trial. Mr. Hendrix thereafter filed a motion to withdraw as counsel based upon irreconcilable differences, over objection by Madden. The trial court stated that it was not going to rule on Hendrix's motion to withdraw or pending evidentiary motions but would continue the case for sixty days.

Mr. Berry took over the case from Mr. Hendrix on March 15, 2016. At the end of Madden's *Faretta* hearing on October 26, 2016, the third trial date was set to begin on March 16, 2017. Thereafter, Mr. Berry filed an affidavit and a motion to continue on March 13, 2017. The basis of the motion was as follows:

> Defendants [sic] grounds are that he is attempting to adequately prepare for this trial but is unable to do so due to his incarceration. Counsel has attempted to send documents to [Madden] so that he can prepare his

> defense but the institution where [Madden] is incarcerated refuses to give the documents to [Madden] without an Open Records Request and payment for copies. [Madden] needs those documents to adequately prepare. This Motion is not being filed for purposes of unnecessary delay, but so that [Madden] can adequately prepare his defense.

The Commonwealth did not object to the continuance.

The trial court deliberated on the motion at the final pre-trial hearing on March 15, 2017. At the hearing, Mr. Berry described the specific documents mentioned in his motion for a continuance as a 48-page transcript the defense had made of the May 26, 2016 missing evidence hearing that Madden was going to use in his cross-examination of three witnesses, as well as Madden's prior incident reports from the jail that the Commonwealth had provided after a March 7, 2017, pre-trial hearing. No potential uses were given by Mr. Berry for the incident reports.

Mr. Berry indicated that he had tried to send the documents to Madden at the prison by express mail on Friday, March 10, 2017. He also indicated that he had attempted to fax them as well. When Mr. Berry spoke to Madden later that day, Madden had not received the documents, after which Mr. Berry moved for the continuance. Madden ultimately received both the transcript of the hearing and the incident reports at 10:30 p.m. the night before the March 15, 2017, hearing.

The trial court denied the motion to continue, noting that Madden had been present for the transcribed missing evidence hearing. The court also reasoned that, although Madden had just received the documents, he would have the rest of the day and evening to review them, as well as have them at trial for purposes of cross-examination. An order reflecting the court's filing was subsequently entered finding that Madden had failed to state sufficient cause for a continuance and that denying the request would not lead to identifiable prejudice.

Kentucky Rule of Criminal Procedure (RCr) 9.04 provides, in pertinent part, that:

> The court, upon motion and sufficient cause shown by either party, may grant a postponement of . . . trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it.

A decision to grant or deny a continuance "is within the sound discretion of the trial court based upon the unique facts and circumstances of the case." *Eldred v. Commonwealth*, 906 S.W.2d 694, 699 (Ky. 1994), *overruled on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003) (citation omitted). Upon appellate review, the trial court's ruling stands unless the court abused its discretion. *Lovett v. Commonwealth*, 858 S.W.2d 205, 208 (Ky. App. 1993). A court abuses its discretion if its decision is "arbitrary, unreasonable, unfair, or

unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted).

The Kentucky Supreme Court has identified certain factors which the court should consider in ruling on a motion for a continuance. *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). Those factors are "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." *Id*. (citation omitted).

In this case, the trial court did not abuse its discretion in denying Madden's request for a continuance. Regarding the length of the delay, the case had been pending nearly two years since Madden's arraignment in April 2015. Additionally, the trial court had already continued the trial twice. Although the litigants, witnesses, and counsel were all local and would not be inconvenienced by a continuance, the case was not complex.

Further, the transcribed hearing had taken place almost a year before Madden filed the motion to continue, which was clearly a sufficient time period in which to produce a transcript and tender a copy to Madden. Additionally, as the trial court noted, the transcript would not have been completely unfamiliar to

Madden, as he was in attendance at the hearing. The transcript was not overly lengthy, and Madden had the remainder of that day and evening to review the transcript.

Likewise, the trial court did not err in its conclusion that the incident reports did not present sufficient cause for a continuance. The reports at issue were four single-page summaries of prior incidents involving Madden at the jail, and none of the summaries were more than a paragraph in length. Further, neither Madden nor Mr. Berry provided information as to their relevance in the matter. The record reflects that Madden was aware of their subject matter and had sufficient time to examine them before the trial. The trial court did not abuse its discretion in denying Madden's motion for a continuance.

## III. MOTION FOR DIRECTED VERDICT

Madden next argues that the trial court erred when it denied Madden's motion for a directed verdict of acquittal at the close of the Commonwealth's case-in-chief on the first-degree criminal mischief and third-degree assault charges. Specifically, Madden argues that the Commonwealth failed to present satisfactory evidence that he broke the cell window or intentionally or wantonly spit on Deputy Pierce.

"A directed-verdict motion is reviewed in light of the proof at trial and the statutory elements of the alleged offense." *Acosta v. Commonwealth*, 391

S.W.3d 809, 816 (Ky. 2013) (citing *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011)). In considering the motion,

> 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).

The analysis upon appellate review is whether "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." *Id*. "[O]nly then the defendant is entitled to a directed verdict of acquittal." *Id*. (citation omitted).

**a. <u>First-Degree Criminal Mischief</u>**

Madden contends that the Commonwealth failed to present any sufficient evidence that would prove beyond a reasonable doubt that Madden was the individual who broke the window. Kentucky Revised Statutes (KRS) 512.020(1) provides that "[a] person is guilty of criminal mischief in the first degree when, having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of $1,000 or more."

In the case *sub judice*, Madden argues that the deputies could only speculate that Madden was upset because he was not allowed to purchase another phone card, and that there were other inmates in the cell who had enough time to retreat to the pods in the time that it took for Deputy Pardue to walk from the control room to the cell. Further, Madden argues that there was no evidence that the showerhead was the item that caused the damage to the cell door.

The evidence in this regard, drawing all inferences in favor of the Commonwealth, was sufficient to submit the matter to the jury, as it goes to "the credibility and weight to be given" to the deputies' testimony. *See Benham*, 816 S.W.2d at 187. Witness testimony was much of the evidence in this case, and "the credibility of witnesses and the weight to be given to sworn testimony are for the jury to decide." *Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002) (citation omitted).

Moreover, given the witness testimony, the jury could reasonably infer that it was Madden who broke the window, and that he used the showerhead to do so. A jury is permitted to make reasonable inferences from circumstantial evidence. *Dillingham v. Commonwealth*, 995 S.W.2d 377, 380 (Ky. 1999) (citing *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997)). Here, such an inference by the jury was reasonable. Testimony that Madden was the only person who was angry that evening, that he was angry for a particular reason, that he was

beating on the door, that the window of the door was broken directly thereafter, that he was standing near the door, that no other inmates were in the foyer area, that the showerhead could be removed, and that the showerhead matched the hole in the glass, enabled a jury to reasonably infer that Madden was the offender. Accordingly, the trial court properly denied the motion for a directed verdict.

**b. Third-Degree Assault**

Madden similarly claims that no sufficient evidence was presented that he intentionally or wantonly spit on Deputy Pierce. KRS 508.025(1)(b) provides, in pertinent part, that "[a] person is guilty of assault in the third degree when the actor . . . [b]eing a person confined in a detention facility . . . inflicts physical injury upon or throws or causes feces, or urine, or other bodily fluid to be thrown upon an employee of the facility[.]" While KRS 508.025(1)(b) does not assign a *mens rea*, this Court has found that the "culpable mental state" required under the statute is to "intentionally or wantonly" inflict the injury. *Covington v. Commonwealth*, 849 S.W.2d 560, 562 (Ky. App. 1992).

Here, the evidence was again sufficient for the jury to find that Madden intentionally or wantonly spit on Deputy Pierce. First, as to the actual occurrence of the spitting incident, Deputy Pierce testified that Madden spit on him, and such testimony was substantiated by Deputy Pardue and Deputy Payne.

As discussed in the subsection above, that testimony, if assumed to be true, was sufficient to submit the matter to the jury.

Moreover, the jury could also reasonably find that Madden acted intentionally or wantonly when he spit. As noted by the Kentucky Supreme Court in *Quisenberry v. Commonwealth*, "[s]eldom is there direct evidence of a defendant's state of mind, but direct evidence is not required. . . . [S]tate of mind . . . may be established by circumstantial evidence. That evidence includes the defendant's actions preceding and following the charged offense as well as the defendant's knowledge and the surrounding circumstances." 336 S.W.3d 19, 36 (Ky. 2011) (internal citations and quotations omitted).

Here, Deputy Pierce testified that before Madden spit on him, he was "rais[ing] hell" and "cussing" while in the restraint chair. From this testimony, the jury could deduce that Madden acted with the requisite culpable mental state. "A defendant may be presumed to intend the natural and probable consequences of his act . . . ." *Smith v. Commonwealth*, 737 S.W.2d 683, 688 (Ky. 1987). We find no error.

## IV. MISSING EVIDENCE INSTRUCTION

Madden's final claim of error is that the trial court erred when it denied his request for a missing evidence instruction. Specifically, he claims that jail staff failed to preserve a surveillance video of the spitting incident. Prior to

trial, Madden moved the trial court to either dismiss the charges against him or to provide a missing evidence instruction regarding the missing surveillance videotape.

The trial court held an evidentiary hearing regarding the missing video, at which time Deputy Sandra Garrison testified regarding the correction institution's video surveillance system. She testified that, while the cameras will record any type of movement, the system ultimately overwrites the previous footage when it reaches its storage capacity. Deputy Garrison testified that the maximum time the system keeps data before overwriting itself is 90 days, but that it can be a lesser amount of time depending on the amount of data recorded. She also testified that a great deal of activity occurs in the area in which these events took place, so it could have overwritten itself sooner than that 90-day time period. Deputy Garrison testified that no one at the jail was aware of these limitations before this incident, and that up until then, she believed the system would hold recordings for six months to a year. She further testified that the jail was not intentionally destroying evidence.

Upon the Commonwealth's request for the video approximately four to six months after the occurrence of the events in this case, Deputy Garrison discovered that the video had already been overwritten. No one at the jail knew the video was gone before then. The trial court ultimately denied Madden's

request concerning the missing evidence instruction, finding that the jail had not intentionally destroyed the video and, in any event, there was no proof that the videotape would have been exculpatory due to the vantage point of the camera in relation to Madden's location at the time he allegedly spit on Deputy Pierce.

"A missing-evidence instruction specifically allows the jury to draw an inference against the Commonwealth from the fact that evidence is missing, lost, or destroyed." *Swan v. Commonwealth*, 384 S.W.3d 77, 92 (Ky. 2012). However, a missing evidence instruction is only required "when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed" and requires "some degree of 'bad faith[.]'" *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). If evidence is "lost due to mere negligence or inadvertence, which, in effect, negates a finding of bad faith, the missing [evidence] instruction should not be given." *Ordway v. Commonwealth*, 391 S.W.3d 762, 793 (Ky. 2013) (citation omitted). An appellate court reviews a trial court's decision of whether to give a missing evidence instruction for an abuse of discretion. *University Medical Center, Inc. v. Beglin*, 375 S.W.3d 783, 790-91 (Ky. 2011).

In this case, the trial court correctly refused to give a missing evidence instruction. Madden provided no evidence that the surveillance video was

exculpatory, that it was lost without explanation, or that it was lost in bad faith. As discussed, the testimony established that the disappearance of the evidence did not result from bad faith but, at most, inadvertence or inattention. The trial court considered the testimony it was provided and properly found that the instruction was not warranted. We can find no abuse of discretion.

## CONCLUSION

For the reasons stated herein, we affirm the Allen Circuit Court's final judgment of conviction against Madden.

ACREE, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

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