

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000488-MR

TRACY SCOTT SMITH

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 17-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, GOODWINE, AND TAYLOR, JUDGES.

COMBS, JUDGE: Appellant, Tracy Scott Smith, was convicted of two counts of third-degree assault, one count of resisting arrest, one count of second-degree disorderly conduct, and one count of being a first-degree persistent felony offender (PFO). On appeal, he contends that he should have been granted a directed verdict

on the third-degree assault charges and that the jury instructions created unanimity errors. Finding no error after our review, we affirm.

We refer to the record only as necessary to resolve the issues before us. Smith and Tammy Johnson were in a long-term relationship. On May 28, 2017, Tammy called 911 because Smith was in a rage, throwing and breaking things. Officers Cook and Bright were dispatched to the residence. Officer Cook placed Smith under arrest. While being escorted outside, Smith resisted arrest and became combative, kicking Officer Cook in the chest and attempting to kick Officer Bright.

A Marion County grand jury indicted Smith on two counts of assault in the third degree, KRS¹ 508.025;² assault in the fourth degree; resisting arrest; disorderly conduct in the first degree; menacing; and being a persistent felony offender in the first degree. The case proceeded to trial on January 22, 2018. The court granted a directed verdict as to the charge of assault in the fourth degree. A jury found Smith guilty of two counts of assault in the third degree, disorderly conduct, resisting arrest, and being a persistent felony offender (PFO) first degree.

¹ Kentucky Revised Statutes.

² In relevant part, KRS 508.025(1) provides that:

A person is guilty of assault in the third degree when the actor:

(a) . . . intentionally causes or attempts to cause physical injury to:

1. A state, county, city, or federal peace officer[.]

On March 2, 2018, the trial court entered judgment and sentenced Smith to ten years.

Scott raises two arguments on appeal. He first contends that the trial court erred in denying directed verdicts on the third-degree assault charges.

Under the standard for a directed verdict, a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187-88 (Ky. 1991). Having undertaken this process, the trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence, but it should not do so if more than a scintilla of evidence is produced from which it would be reasonable for the jury to return a verdict of guilty. *Id.*

On appellate review, the standard is more deferential. The trial court should be reversed only if “it would be *clearly* unreasonable for a jury to find guilt.” *Id.*

Johnson v. Commonwealth, 405 S.W.3d 439, 444-45 (Ky. 2013).

Smith argues that there was no evidence that his actions constituted an intentional act; therefore, he claims that it was unreasonable for the jury to convict him on the assault charges. Specifically, he contends as follows:

Ofc. Cook . . . testified that he was kicked, but that he did not remember whether he was kicked before or after Mr. Smith was tased. If the kick or attempted kick (the jury was instructed on both) of Ofc. Cook occurred while Mr. Smith was being tased, then the kick was involuntary – it was not an intentional act. Similarly, for the assault

charge involving Ofc. Bright, the attempted kick could have been during the time they were tasing Mr. Smith, so the attempted kick was not intentional. The body cam videos were blurry and only ten seconds elapsed from the time the officers took Mr. Smith down to the ground to when they started to tase him. The videos do not support the officers' version of events.

Smith was charged with assault in the third degree under KRS 508.025, which requires that the Commonwealth prove that he intentionally caused or attempted to cause physical injury to a peace officer. Both officers testified that Officer Cook was kicked before Smith was tased. "Testimony from a law enforcement officer amounts to substantial evidence. Furthermore, substantial evidence is more than a scintilla." *Montgomery v. Commonwealth*, 505 S.W.3d 274, 278 (Ky. App. 2016) (citations and internal quotation marks omitted).

With respect to the assault charge involving Officer Bright, Smith theorizes that "the attempted kick *could have been* during the time they were tasing, so [it] was not intentional." (Emphasis added). Smith further contends that there was no evidence that his actions constituted an intentional act. The Commonwealth is not required to "rule out every hypothesis except guilt beyond a reasonable doubt." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 267 (Ky. 2006) (citations and internal quotation marks omitted). Moreover, "[s]eldom is there direct evidence of a defendant's state of mind, but direct evidence is not

required. . . . [I]ntent . . . may be established by circumstantial evidence. That evidence includes the defendant's actions preceding and following the charged offense" *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 36 (Ky. 2011) (citations and internal quotation marks omitted). As the Commonwealth notes, the body cam footage alone showed that Smith was agitated and belligerent. We conclude that the trial court did not err in denying Smith's motion for a directed verdict.

Smith also argues that the jury instructions created unanimity-verdict errors. He acknowledges that the issue is not preserved, but he requests review under RCr³ 10.26, which provides in relevant part that:

A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In *Martin v. Commonwealth*, 456 S.W.3d 1, 9-10 (Ky. 2015), our Supreme Court held "that all unanimous-verdict violations constitute palpable error resulting in manifest injustice." We must now determine if a unanimous-verdict violation occurred in the case before us.

³ Kentucky Rules of Criminal Procedure.

Smith cites and relies upon *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013). In that case, Johnson was convicted of the murder and first-degree criminal abuse of her two-year-old son. Johnson alleged that the jury's verdict violated the unanimity requirement because the jury instructions regarding the charge of first-degree criminal abuse failed to specify what injury or abusive act should be considered by the jury. The instructions provided as follows:

You will find the Defendant guilty of First-Degree Criminal Abuse under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about and between the dates of August 28, 2009 and October 23, 2009, and before the finding of the Indictment herein, [Johnson] intentionally abused [her son.]

Id. at 447-48. Medical testimony revealed that the infant had suffered at least three leg fractures. Evidence at trial focused on two injuries, the second and third leg fractures, and acts that caused them which could support the instruction.

The Court explained that although “the federal constitution’s requirement of unanimity has been held not to apply to the states . . . Section 7 of the Kentucky Constitution requires a unanimous verdict.” *Id.* at 448 (citations and internal quotation marks omitted). But, the instruction in *Johnson* “did not require the jury to differentiate which of the two instances was the basis of the conviction.” *Id.* at 449. Our Supreme Court held that:

[S]uch a scenario—a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement of a unanimous verdict.

...

Id.

A duplicitous count, whether appearing in an indictment or jury instructions, presents multiple constitutional problems, including that the jury verdict is not unanimous, which is the issue raised in this case. “The courts have stated that two of the reasons for rejecting duplicitous indictments are that ‘a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both’ and that ‘there is no way of knowing . . . whether the jury was unanimous with respect to either.’” *Id.* at 369-70 (quoting *United States v. Starks*, 515 F.2d 112, 116-17 (3d Cir. 1975)).

...

The biggest hurdle is in understanding that cases like this one do not present multiple theories of a crime, but instead multiple distinct crimes under a single count. Thus, unlike the case where two theories—such as two means or mental states—of a single crime are presented in an instruction, we have an instruction that includes multiple crimes but directs only one conviction.

Id. at 454-55.

In the case before us, Smith takes issue with the instruction for the charge of third-degree assault on Officer Cook, which provides as follows:

That in this county on or about May 28, 2017, and before the finding of the indictment herein, Tracy Scott

Smith intentionally caused or attempted to cause physical injury to [Officer] Chris Cook by kicking him

Smith contends that this instruction is duplicitous, citing *Jenkins v. Commonwealth*, 496 S.W.3d 435 (Ky. 2016), because it allowed the jury to find Smith guilty of kicking *or* attempting to kick Officer Cook but that it did not specify which act the jury believed Smith committed. In *Jenkins*, our Supreme Court held that an instruction which allowed the jury to convict on the basis of either of two sodomies was duplicitous. The Court explained that:

[D]uplicitous instructions [are distinguishable] from . . . combination instructions . . . which allow the jury to agree that a particular set of actions by the defendant amount to a particular crime, but to disagree (when the evidence supports such disagreement) about which theory of the crime applies. Combination instructions . . . do not run afoul of the Kentucky Constitution’s requirement that felony jury verdicts be unanimous, because “no matter which theory they accepted, all the jurors convicted under a theory supported by the evidence and *all the jurors convicted the defendant of the same offense.*” *Kingrey [v. Commonwealth]*, 396 S.W.3d [824, 830 (Ky. 2013)] (emphasis supplied; citation and internal quotation marks omitted).

Duplicitous instructions, however, do not provide the same guarantee that all the jurors agreed as to the offense. Rather, a duplicitous instruction “allow[s] the jury to convict [the defendant] of one crime based on two separate and distinct criminal acts that violated the same criminal statute.” [Kingery] 396 S.W.3d at 831.

Jenkins, 496 S.W.3d at 448 (footnote omitted).

The Commonwealth submits that the instructions are not duplicitious as were those in *Johnson* or *Jenkins*. The Commonwealth explains that a single act – the altercation between Smith and Officer Cook – was the focus of the instruction and “[w]hether the physical injury was attempted or actually caused is simply a theory of the same criminal act.” We agree with that reasoning and hold that the unanimity of the verdict has not been violated or compromised. *Conrad v. Commonwealth*, 534 S.W.3d 779, 784 (Ky. 2017) (Conviction of the same offense under either of two alternative theories does not deprive defendant of right to unanimous verdict if there is evidence to support a conviction under either theory).

Smith also contends that the instruction for the charge of third-degree assault on Officer Bright violated the requirement for a unanimous verdict. The instruction provided as follows:

That in this county on or about May 28, 2017, and before the finding of the indictment herein, Tracy Scott Smith attempted to cause physical injury to Dylan Bright by attempting to kick him

Smith contends that Officer Cook testified “that Mr. Smith kicked multiple times. Each of the kicks could have been a separate instance of third degree assault.” Smith further contends that the same unanimity problem occurred in the instruction for the charge of resisting arrest and in the instruction for the charge of disorderly conduct because the “instructions did not require the jury to specify of which criminal act it found Mr. Smith guilty.” We cannot agree.

2462296 (Ky. June 13, 2019), is instructive. There, the jury instruction on

Possession of a Controlled Substance provided as follows:

You will find the defendant, Joshua McAlpin, guilty of Possession of a Controlled Substance First Degree (Heroin) under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Jefferson County, Kentucky on February 10, 2011, Joshua McAlpin knowingly had in his possession a quantity of heroin; AND

B. That Joshua McAlpin knew the substance possessed by him was heroin.

Id. at *4.

McAlpin argued that his right to a unanimous verdict was violated because several different potential sources of heroin were found in the home: four pieces of cotton and seven spoons. McAlpin claimed that the instructions did not specify which item was to be considered the heroin source; therefore, some jurors could have believed he possessed heroin because of spoon number five, others because of cotton piece number three. Our Supreme Court disagreed and explained that the jury convicted McAlpin because it believed beyond a reasonable doubt that he possessed heroin on February 10, 2011. “The evidence did not demonstrate another instance of possession of heroin that occurred on a different date, and the jury instructions did not have a date range within which time both instances were committed. Therefore, *Johnson* and *Kingrey* do not apply[.]” *Id.*

Finding no error as to any of the issues raised, we AFFIRM the judgment of the Marion Circuit Court.

GOODWINE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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