IMPORTANT NOTICE

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RENDERED: OCTOBER 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2001-SC-0666-MR

DATE 11-11-04 Ella Grovitt, D.C.

ROBERT C. BLAKEMAN — APPELLANT

V.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
1999-CR-0038

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Blakeman of second-degree assault, first-degree wanton endangerment, operating a motor vehicle under the influence of alcohol and as a first-degree persistent felony offender. He was sentenced to a total of forty years in prison.

The questions presented are whether it was error not to direct a verdict on the first-degree wanton endangerment charge; whether it was error to admit evidence of other bad acts and whether it was error not to grant a mistrial for the failure of the prosecution to comply with a discovery order regarding the blood test evidence.

Blakeman first entered a plea of not guilty, but decided to enter into a plea agreement for each of the four counts in exchange for a recommendation by the Commonwealth for a concurrent sentence of ten years. In accepting the guilty plea, the

trial judge conducted an extensive colloquy and made findings that the plea was entered knowingly, intelligently and voluntarily. At his scheduled sentencing hearing, Blakeman withdrew his guilty plea, asserting that he had been misinformed about parole eligibility. The trial judge then confirmed that the defendant understood that if he withdrew the guilty plea he would be facing forty years if convicted at trial. The original guilty plea was entered in November 1999, the plea bargain occurred on February 8, 2000, the sentencing hearing on April 11, 2000, and the ultimate trial in November 2000.

On October 6, 1999, a serious traffic accident occurred at approximately 1 a.m. in Paris, Kentucky. Larry Tipton, a night foreman and head of security at a private company, overheard the traffic accident report on his police radio. Tipton, who had served for twelve years as a sergeant on the Paris Police Department, testified that he was aware of the seriousness of the traffic problem and volunteered to assist the police with traffic control. He was at the intersection directing traffic for approximately 40 minutes when Paris police officer Frakes joined him. Both Tipton and Officer Frakes had parked their cars with their emergency lights on so as to block traffic. The pair directed oncoming traffic for about the next 30 minutes without incident.

At approximately 2:15 a.m., Officer Perry and the mobile command center of the Paris police department arrived. The command center was a very large truck similar to an ambulance which stood over ten feet tall and was equipped with emergency gear. The command center was parked in between and slightly in front of the other cars. All the vehicles had emergency lights on. Within moments, Tipton heard another car coming up the road and told the officers that he would direct one last car and then turn the entire matter over to them. He walked to the intersection with a flashlight to flag the

oncoming car. Tipton testified that he could not at first see the car, but he could only hear it. When he finally saw it, the car was not speeding, but was not slowing down. Tipton stated that he yelled, “He ain't going to stop!” He then “took off running for the ditch” on the side of the road. Tipton said if he didn't take off running, he felt “sure he [the driver] would have hit him.” When he got up off of the ground, he heard the crash and saw that the car had rammed into the parked command center. He never saw or heard the car try to stop.

After the crash, Officer Frakes found Officer Perry lying in the command center and called for help. He then went to the other vehicle where the driver was still gunning the engine. Officer Frakes verified this was not a situation where the vehicle's accelerator was stuck; it was intermittent – the driver was still pumping the gas. The police officer opened the door of the car and turned off the ignition. As he did, he discovered several beer cans on the floor boards and detected the odor of alcohol on the driver. Officer Frakes indicated that the driver had slurred speech and glassy eyes. When the driver was taken out of the car, he was somewhat belligerent. Both Officer Frakes and Tipton testified that based on their experience, they believed that the driver was under the influence of alcohol. The evidence ultimately revealed that Blakeman was the driver.

Shortly thereafter, Kentucky state police trooper Kirkland responded to the scene and began his investigation of the crash site. He concluded that Blakeman was driving between 40 – 50 m.p.h. when he rammed into the command center. The trooper found no skid marks in the road. He went to hospital and obtained a voluntary blood sample from Blakeman, who was being very belligerent. The sample was drawn about two and a half hours after the crash and showed a blood alcohol level of .17.

At trial, Blakeman testified in his own defense and stated that he had no recollection of the crash and no recollection of being at the hospital. He also testified that he did not remember seeing Tipton or the lights on the top of the vehicles in the roadway. Upon being questioned by his own counsel, Blakeman admitted that he was a convicted felon and had a prior DUI conviction. He explained that the DUI was from 9 years earlier and that he lost control of his car and hit a fence.

Upon cross-examination, Blakeman admitted that he had been drinking whiskey that night. He also conceded that his lack of memory about the incident may have been caused by alcohol. The jury found the defendant guilty on all charges. This appeal followed.

I. Directed Verdict on First-degree Wanton Endangerment

Blakeman argues that it was error to deny his motion for a directed verdict on the first-degree wanton endangerment charge. He asserts that the evidence was insufficient to establish that his conduct manifested an extreme indifference to the value of human life or created a substantial danger of death or serious physical injury as required by KRS 508.060. He maintains that KRS 508.070, second-degree wanton endangerment, requires only "substantial danger of physical injury" without any reference to death or serious physical injury. He believes his conduct did not express extreme indifference to the value of Tipton's life because there was no conscious lack of concern that death might ensue.

The trial judge overruled the motion for directed verdict and Blakeman did not renew his motion at the close of all the evidence, thus the claim is not properly preserved for appellate review. In order to preserve an issue relating to the sufficiency of the evidence, the defendant must renew his motion for a directed verdict at the close

of all evidence. Baker v. Commonwealth, Ky., 973 S.W.2d 54 (1988). Here, while Blakeman did move for a directed verdict at the close of the prosecution's case, he did not renew his motion at the close of all the evidence.

In any event, taking the evidence as a whole in the light most favorable to the Commonwealth, assuming it to be true, and drawing all fair and reasonable inferences in favor of the Commonwealth, it was not clearly unreasonable for the jury to find guilt. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Appellate review is governed by the standard stated in Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). Here, the evidence established that Blakeman was driving a vehicle between 40 and 50 m.p.h. in a highly intoxicated state. There was evidence of a blood alcohol level of .17 more than two hours after the incident. Immediately after the crash, Blakeman was still pumping the gas and had several beer cans in the car. He smelled of alcohol, had slurred speech and glassy eyes. Blakeman failed to observe three emergency vehicles, each with lights flashing and failed to notice Tipton attempting to flag him to stop. It is a reasonable inference that an individual who is struck by a vehicle traveling at a rate of speed between 40 - 50 m.p.h. is very likely to suffer serious physical injury or death. In this case, Officer Perry was actually struck by the same vehicle and suffered serious physical injury. There was sufficient evidence to withstand a motion for directed verdict of acquittal on wanton endangerment first.

II. Prior Bad Acts

Blakeman contends that evidence of other prior bad acts was improperly admitted during the trial in violation of KRE 404(b). He claims that the state trooper made improper statements during his testimony and that the prosecution made improper remarks during the penalty phase closing arguments.

While explaining that Blakeman was belligerent at the hospital, the trooper stated, "I know Mr. Blakeman just from the counties that I work. I've had prior dealings with Mr. Blakeman." He later said, "I believe ... I happen to live in the same county that Mr. Blakeman lives in, and so I know him pretty well."

Blakeman also refers to comments by the Commonwealth's Attorney in the sentencing phase that "One of these convictions involved the use or possession of morphine. The cold check he's talking about was an $18,000 cold check. And, now he's climbing back into the car and doesn't care. There was a domestic dispute with his girlfriend so he took to the highway with a .17." The Commonwealth introduced the final judgment in support of the possession charge and the indictment and final judgment in support of the bad check charge.

Blakeman made no objection to any of the statements when made at trial. He concedes that neither allegation is preserved for appellate review, but seeks relief on the basis of palpable error pursuant to RCr 10.26. In order to permit review on the basis of palpable error it must be established that there was an error and that such error was obvious, affected the substantial rights of the defendant and has caused a manifest injustice. See Brock v. Commonwealth, Ky., 947 S.W.2d 24 (1997); United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

The statements by the trooper do not clearly impute the commission of any unconnected crimes to the defendant; nor do they tend to show any specific prior bad acts. The two statements were vague references to the officer's familiarity with Blakeman, and as such do not constitute a violation of KRE 404(b). Under no circumstances do they rise to the level of palpable error. There is no indication that this testimony affected the verdict in any way. Cf. Pace v. Commonwealth, Ky., 82 S.W.3d

894 (2002).

There was no error in the penalty phase closing argument by the Commonwealth. In Maxie v. Commonwealth, Ky., 82 S.W.3d 860 (2002), the court recognized that KRS 532.055(2)(a)(2) permits the Commonwealth to introduce evidence of the nature of prior offenses during the penalty phase. Here, the evidence was nothing more than a general description of the prior offenses and did not exceed the scope of the evidence held admissible in Robinson v. Commonwealth, Ky., 926 S.W.2d 853 (1996). Moreover, it was the defense who introduced these facts during Blakeman's closing arguments. The Commonwealth was simply rebutting the arguments that his prior convictions did not support a long sentence.

III. Discovery – Blood Alcohol

Blakeman argues that the trial judge erred by not granting a mistrial because of the failure of the Commonwealth to comply with a discovery order by virtue of providing the defense with the blood test results only four days before trial in violation of RCr 7.24. Blakeman claims that this issue is preserved by the pretrial motion for discovery and a motion to suppress the blood alcohol test based on the alleged late compliance with the discovery order.

On the morning of trial, a hearing was held on the motion to exclude the blood alcohol test. Defense counsel claimed that two discovery motions had been filed without a response and that the test results were only received within the last four days. The Commonwealth responded that it had produced the report the same day it was received and that there was no discovery deadline. It contended that Blakeman had known for sometime that the prosecution intended to introduce evidence of his blood alcohol and that the discovery had been interrupted by his initial guilty plea as well as

subsequent procedural activities. The trial judge overruled the motion to exclude the evidence.

The prosecution presented testimony about the blood alcohol test results. Blakeman did not object to the introduction of such evidence.

A review of the record indicates that there was no motion for a mistrial, only a motion to exclude evidence. Nor does the record contain a discovery order. Further, Blakeman never sought a continuance and did not identify what, if anything, would have been done differently had the report been received earlier. It is within the discretion of the trial judge to permit the discovery or inspection of materials not previously disclosed as well as the option of granting a continuance or the prohibition of the introduction of evidence not previously disclosed. See Neal v. Commonwealth, Ky., 95 S.W.3d 843 (2003); Berry v. Commonwealth, Ky., 782 S.W.2d 625 (1990); RCr 7.24(9). Our review of the record does not disclose an abuse of discretion by the trial judge in refusing to exclude the test result.

Blakeman received a fundamentally fair trial and there was no violation of either the state or federal constitutions.

The judgment of conviction is affirmed.

All concur.

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