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NOT TO BE PUBLISHED OPINION

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RENDERED: APRIL 23, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000610-MR

DATE

Kelly Klaber D.C.

SHELBY R. LITTLE, JR.

APPELLANT

V.
ON APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
NO. 04-CR-00098

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant, Shelby Ray Little, Jr., was convicted by a Meade Circuit Court jury of three counts of first-degree assault, one count of first-degree wanton endangerment, one count of operating a motor vehicle under the influence-first offense, one count of driving without insurance, one count of driving without an operator's license, and of being a first-degree persistent felony offender. For these crimes, Appellant received a total sentence of twenty-five years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts five arguments on appeal: 1) that the trial court abused its discretion when it allowed the introduction into evidence of Appellant's prior convictions for driving under the influence; 2) that the trial court improperly denied his motion for a directed verdict for one count of first-degree assault; 3)

that the trial court erred by not instructing the jury on the lesser included offense of second-degree assault; 4) that the trial court improperly denied his motion for a directed verdict on first-degree wanton endangerment; and 5) that the trial court improperly refused to suppress Appellant's blood-alcohol test results. Because the trial court did improperly allow the introduction of Appellant's prior driving under the influence convictions, we reverse Appellant's convictions and sentence. We will also address Appellant's other allegations of error to aid the trial court on retrial.

On August 9, 2004, Appellant's truck crossed over the center line of Liberty Road in Meade County and collided with a car driven by Angela Sosh. Riding with Angela were her two-year-old son Nathan, and sixteen-year-old Courtney Moon. All three suffered injuries from the accident. Appellant was taken to the hospital as a result of his injuries, but his blood was not drawn until over three hours had passed since the accident. Appellant's blood test results indicated that he had a blood alcohol level of 0.29%.

At trial, several witnesses testified that Appellant drank alcohol at a local establishment prior to the accident, although they did not agree on the amount of alcohol he consumed or the degree of intoxication he exhibited. Other witnesses testified that Appellant drove erratically before the accident. Meade County Deputy Sheriff Mike Robinson testified that when he arrived at the accident scene he observed beer cans both inside and outside of Appellant's truck. Deputy Sheriff Robinson, however, admitted at trial that he was unsure

of Appellant's intoxication level at the accident scene. Further facts will be developed as necessary.

I. Admission of Appellant's prior convictions for driving under the influence was error

Appellant's first allegation of error is that the trial court improperly allowed the Commonwealth to admit his four prior convictions for driving under the influence into evidence. These convictions occurred between 1995 and 1997, seven years before the accident. Prior to trial, the Commonwealth stated its intent to introduce the convictions as KRE 404(b) evidence. The Commonwealth believed that this evidence was relevant to Appellant's modus operandi and that it would also prove his intent, knowledge, and absence of mistake regarding driving while intoxicated. Later, the Commonwealth argued that the convictions could be introduced to show habit evidence under KRE 406.

Over Appellant's objection, the trial court found that his prior convictions were admissible under KRE 404(b). The trial court held that the convictions were evidence of Appellant's modus operandi, or his pattern of repeatedly driving while intoxicated, or his absence of mistake in driving intoxicated. Appellant objected and maintained the objection throughout trial, preserving the error. The Commonwealth began its case in chief by informing the jury of Appellant's prior convictions for driving under the influence. The Commonwealth also mentioned the four prior convictions during its closing

argument.

The introduction of Appellant's prior convictions for driving under the influence was error. In Commonwealth v. Ramsey, 920 S.W.2d 526, 528 (Ky. 1996), we held that "previous DUI convictions do not fall within either the exceptions outlined by KRE 404(b) or those recognized by this Court." The only elements necessary to prove that an individual is guilty of driving under the influence are: 1) the operation or physical control of a motor vehicle and; 2) impairment as described in KRS 189A.010. Id. Thus, in Ramsey, the introduction of the prior convictions for driving under the influence was found to be unduly prejudicial, and reversal was necessary. Id. In Commonwealth v. Pace, 82 S.W.3d 894 (Ky. 2002) we again held that the introduction of prior convictions for driving under the influence was error, but that it did not rise to the level of palpable error.

In this matter, Appellant's prior convictions for driving under the influence were unduly prejudicial and thus should not have been admitted. See Ramsey, 920 S.W.2d at 528 ("Due to the prejudicial effect, prior DUI convictions shall not be introduced during the prosecution's case-in-chief for a violation of KRS 189A.010(1)"). All the Commonwealth needed to prove in the guilt phase of the trial was that Appellant operated a motor vehicle while he was impaired per KRS 189A.010. The prior DUI offenses were not relevant because they do not tend to prove that Appellant was operating the motor vehicle or that he was impaired by intoxicants on the occasion in question. We

therefore reverse Appellant's convictions and sentence and remand this case to the Meade Circuit Court for a new trial. We now will review Appellant's other allegations of error to aid the trial court on retrial.

II. The trial court erred in not granting Appellant's motion for a directed verdict on the charge of first-degree assault against Courtney Moon

Appellant's next argument is that the trial court should have granted him a directed verdict of acquittal on the charge of first-degree assault committed against Courtney Moon. Appellant argues that Moon did not sustain a "serious physical injury" as defined in KRS 500.080(15) from the accident and therefore he cannot be guilty of committing first-degree assault against her. We agree.

Moon's testimony indicated that she suffered a bloodied nose, a cut lip, and a cut on her left knee from the accident. After the accident, Moon received an ace bandage for her knee from the hospital and was subsequently released. Her cuts healed after a week and a half, though a small scar remained on her left knee at the time of trial. Moon described the scar at trial as "not that bad" and likened it to a scar one may receive in a bicycle accident.

Moon also testified about problems she had with her right knee. She testified that a year or so after the car accident her knee gave way as she was playing with her dogs. She was rushed to the emergency room where medical personnel told her that a muscle in her knee was stretched out and would not heal without surgery. Moon acknowledged that a doctor had never told her before the incident with her dog that her knee muscle was stretched or that the

muscle being stretched had anything to do with the car accident. Moon was personally unsure if the car accident had anything to do with the knee injury.

A trial court's decision regarding a directed verdict motion is reviewed under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991):

On motion for 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. 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. In this matter, the Commonwealth presented insufficient evidence for a reasonable juror to find that Appellant committed first-degree assault against Courtney Moon.

In order to convict Appellant of first-degree assault, the Commonwealth had to prove that Appellant:

intentionally cause[d] *serious physical injury* to [Moon] by means of a deadly weapon or a dangerous instrument; or . . . Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to [Moon] and thereby causes serious physical injury to [Moon].

KRS 508.010 (emphasis added). The evidence presented at trial does not

indicate that Appellant caused serious physical injury to Moon. Serious physical injury is defined as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.” KRS 500.080(15). Here the only injuries that can be attributed to the car accident were a bloodied nose, and cuts on Moon’s left knee and lip. While the cut on her left knee left a scar, Moon testified that the scar was minor. The scar certainly has not left “serious and prolonged disfigurement.” See Souder v. Commonwealth, 719 S.W.2d 730, 732 (Ky. 1986) overruled on other grounds by B.B. v. Commonwealth, 226 S.W.3d 47 (Ky. 2007) (holding that burns in and around the mouth of a child did not constitute a “serious physical injury”).

Moon’s injury to her right knee, if caused by the car accident, could qualify as a serious physical injury because it is reoccurring and does affect the use of her leg. However, after reviewing the trial record, it is clear that insufficient evidence was presented to prove that the right knee injury actually was caused by the car accident. Moon first became aware of the knee injury when she awkwardly stepped around her dog. No doctor testified that the injury was caused by the car accident, and Moon was unsure herself what caused the injury to her knee. With such uncertainty surrounding the cause of Moon’s injury, we find that Appellant should have received a directed verdict of

acquittal on the charge of first-degree assault on Moon. At retrial, if similar evidence is presented, the trial court should grant Appellant a directed verdict of acquittal on this charge.

III. The trial court erred by not providing a jury instruction on second-degree assault against Angela Sosh

Appellant next argues that the trial court should have submitted to the jury an instruction on second-degree assault committed against Sosh as a lesser included offense of wanton first-degree assault. Appellant tendered a second-degree assault instruction to the trial court. Appellant argues that this instruction was necessary because the jury could have found that he only acted wantonly instead of with “extreme indifference to human life” as required for a first-degree assault conviction.

A first-degree assault instruction:

should be accompanied by an instruction on second-degree assault, as a lesser-included offense, if: (1) a dangerous instrument was used; and either (2) there is a reasonable doubt whether the degree of the defendant’s wantonness reached the level [of extreme indifference to human life], or only that contained in the definition of ‘wantonly’ in KRS 501.020(3).

1 Cooper, Kentucky Instruction to Juries (Criminal), § 3.34 (5th ed. 2007). A lesser-included offense instruction is appropriate when the jury could maintain doubt concerning the greater offense but find guilt beyond a reasonable doubt of the lesser offense. Parker v. Commonwealth, 952 S.W.2d 209, 211 (Ky.

1997).

Here, there was adequate evidence for a juror to have reasonable doubt about whether Appellant's wantonness reached the level of "extreme indifference to human life," and a second-degree assault instruction should have been given. Testimony at trial varied regarding how much alcohol Appellant consumed prior to the car accident. Inconsistent evidence was also presented as to his level of intoxication at the time of the accident. In light of these inconsistencies a juror could have reasonable doubt regarding whether Appellant acted with "extreme indifference to human life." We must remember that it is the duty of the trial court to provide instructions on every theory of the case covered by the indictment and deducible from or supported to any extent by the testimony. Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). Thus, on retrial, if similar evidence is again presented, a jury instruction on second-degree assault against Sosh should be provided in addition to the first-degree assault instruction.

IV. There was adequate evidence to convict Appellant of first-degree wanton endangerment against Delores Ray

Appellant next argues that the trial court committed error when it denied his motion for a directed verdict on the first-degree wanton endangerment charge committed against Delores Ray. Appellant believes that there was insufficient evidence presented to show that he acted with extreme indifference

to human life, a necessary element for a first-degree wanton endangerment conviction. KRS 509.060(1). This charge stems from an incident that occurred a minute or two before the car accident. Ray was driving along Liberty Road in Meade County when she saw Appellant's truck coming toward her. As they both entered a sharp curve in the road, Appellant's truck gradually came across the center line. Ray was forced to the edge of the road with two of her car's wheels being off in a ditch. Ray honked her horn to get Appellant to drive back in his lane. He did not. Ray accelerated to get around Appellant. The two vehicles did not touch. Later, as Ray was returning home, she came upon the car accident and realized that Appellant's car was the one which nearly drove her off the road.

The evidence presented at trial was adequate for a reasonable juror to find that Appellant committed first-degree wanton endangerment. Again, we review Appellant's motion for a directed verdict to see "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." Benham, 816 S.W.2d at 187. There was evidence presented that Appellant consumed several beers and shots of whiskey before getting in his car to drive. Ray testified that she was partially forced off of the road due to Appellant's poor driving. Had Ray not reacted quickly to Appellant coming across the center line, it is possible that she would have collided with him. Because of the testimony indicating Appellant's consumption of alcohol before driving, a reasonable juror could find that Appellant acted with extreme indifference to

the value of human life. Appellant's poor driving and near collision with Ray certainly created a substantial danger of death or serious physical injury. We find that a directed verdict of acquittal on the charge of first-degree wanton endangerment would be inappropriate if similar evidence is presented on retrial.

V. Results of Appellant's blood test taken over three hours after the accident were admissible.

Appellant's last allegation of error is that the trial court erred by allowing the results from a blood test taken three hours after the car accident to be admitted into evidence. The blood test indicated that Appellant's blood alcohol level was 0.29%. Appellant argues that this admission was error because KRS 189A.010(2) prohibits the admission of blood tests taken over two hours from the initial arrest to be used to determine blood alcohol level as evidence for a prosecution under KRS 189A.010(1)(a) or (e). However, KRS 189A.010(2) clearly states that blood tests taken after two hours are admissible in prosecutions under KRS 189A.010(1)(b) or (d).

The trial court found that the blood test was admissible because the Commonwealth was prosecuting Appellant under KRS 189A.010(1)(b). To that extent, the trial court ordered that no jury instruction would be given on KRS 189A.010(1)(a). The trial court's ruling was correct, and on retrial the results of Appellant's blood test are admissible as part of a prosecution under KRS 189A.010(1)(b).

For the foregoing reasons the judgment and sentence of the Meade Circuit Court is reversed and this matter is remanded for a new trial.

Abramson, Cunningham, Noble, Schroder, Scott and Venters, JJ., concur. Minton, C.J., concurs in result only.

COUNSEL FOR APPELLANT:

Shannon Renee Dupree
Assistant Public Advocate
Department of Public Advocacy
Suite 301, 100 Fair Oaks Lane
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David Bryan Abner
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601