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RENDERED: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000650-MR

TIMOTHY L. MILLS — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 10-CR-00185

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Kenton Circuit Court jury found Appellant, Timothy Mills, guilty of four counts of first-degree wanton endangerment and of being a second-degree persistent felony offender (PFO). For these crimes, Appellant received a twenty-year prison sentence. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

I. Background

On the morning of September 26, 2009, Elsmere Police officers were dispatched in response to a call of shots being fired at a residence with hostages inside. Upon arrival, the officers secured the perimeter and four individuals—Samantha McDonald, Tabatha Herron, Stephon Peters, and Laurence "B" Brown—exited the home.

While at the residence, the officers received information linking the suspect to a green van with dark windows and temporary Ohio tags. Based upon this information, Officer Daniel Fern located a van matching the description approximately a quarter of a mile from the home and initiated a traffic stop. Sergeant Todd Cummings, who arrived to assist in the stop, patted Appellant down and a small bag of marijuana fell from his pant leg. The officers then arrested Appellant and placed him in a cruiser. After the arrest, the officers searched the van and discovered a black mask, a stun gun, handcuffs, and Appellant's cell phone.

Appellant was subsequently indicted and this matter proceeded to trial. Over Appellant's objection, the trial court allowed the Commonwealth to introduce the mask, the stun gun, and the handcuffs via the testimony of Detective Dennis McCarthy. The court also denied Appellant's motion to suppress the contents of his cell phone. As a result, the jury learned that Appellant made thirty-eight calls and sent fourteen text messages to McDonald's phone on the morning in question. With respect to the fourteen text messages, one stated "I got my hammer. I'm outside,"[1] while two others read "I'm still out here" and "So you turned the light off. Ha! Ok." Finally, the jury heard the testimony of several witnesses, including Tabatha Herron, Officers Fern, Tony Embry, and Brandon Marksbury, and two neighbors.

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[1] Based on his experience, Detective McCarthy testified that the term "hammer" is a slang term for a handgun.

Tabatha Herron was the sister of Samantha McDonald, who actually lived in the residence, and the only victim to testify. Herron recalled being in the residence with McDonald and her two friends after returning from the bar and that McDonald woke her up due to shots being fired. However, because of inconsistencies between her initial statements and her testimony, the Commonwealth played a portion of a 911 recording made by Herron and then called Officer Fern and Officer Embry to introduce statements made by Herron immediately after the incident.

Although she remembered calling 911 during the incident, Herron could not remember identifying the shooter as McDonald's ex-boyfriend "Tim." After listening to the 911 recording in which she identified the shooter as such, Herron explained that she may have mentioned Appellant's name because she was drunk and they are not very good friends. According to Officer Fern, Herron stated that Appellant was McDonald's ex-boyfriend, that he was at the residence because he was upset McDonald had a new boyfriend, and that she hid in the bathroom with McDonald's new boyfriend and his acquaintance after hearing two to three gun shots. Moreover, Officer Embry testified Herron had been absolutely sure Appellant was the shooter and both officers indicated that she did not appear intoxicated when they spoke with her.

Jeremy Williams, one of McDonald's neighbors, testified that he had observed a tall, "husky" black male pacing up and down the street while talking on his cell phone with the speaker mode on and that he recognized the voice on

the other end of the line as the woman who lived next door. Williams eventually saw the man fire "a couple of rounds" into the house next door and subsequently leave the area in a dark green van. Although he did not attempt to identify Appellant as the man he saw during his testimony, Williams acknowledged that he then saw the same man standing with the woman who lived next door in her driveway on April 29, 2010. Moreover, Officer Marksbury then testified that he responded to a call on that date and observed Appellant standing with McDonald at her residence.

Finally, Brian Hite, another neighbor, testified that, after hearing four bangs he believed to be gun shots and someone talking "quite loud," he walked out his backdoor and saw Appellant standing by a dark colored van parked down the street. Hite observed Appellant walking back and forth while talking on a cell phone and noticed an object in Appellant's hand.

After trial, the jury returned a guilty verdict and, as enhanced by Appellant's PFO conviction, recommended five year sentences for each count of wanton endangerment to run consecutively for a total sentence of twenty years.[2] This appeal followed.

Appellant now alleges three assignments of error: (1) the trial court erred by refusing to suppress the calls and messages acquired from his cell phone; (2) the trial court abused its discretion when it admitted the mask, stun gun,

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[2] Besides his convictions for wanton endangerment and persistent felony offender, the jury also found Appellant guilty of possession of marijuana. The parties waived jury sentencing for this offense and Appellant received a ninety day sentence to run concurrently with the felony sentences imposed.

and handcuffs; and (3) the trial court erred by denying his motion for directed verdict as to each of the four counts of wanton endangerment.

II. Analysis

A. Consent to Inspect Contents of Cell Phone

Appellant first argues that the trial court erred by refusing to suppress the evidence obtained from his cell phone. When reviewing an order denying a motion to suppress, we consider a trial court's findings of fact as "conclusive" if they are "supported by substantial evidence." RCr 9.78. "Using those facts [if supported], [this Court] then conducts a *de novo* review of the trial court's application of the law to those facts to determine whether the decision is correct as a matter of law." *Commonwealth v. Jones*, 217 S.W.3d 190, 193 (Ky. 2006).

According to Appellant, nothing in the record supports the trial court's finding that he consented to the search. Yet, Sergeant Cummings testified that Appellant had given him consent at the suppression hearing. Appellant notes, however, that there was no indication of consent during the discovery process and no mention of consent in the search warrant affidavit. As such, he contends that the record actually contradicts the officer's testimony. We disagree.

As we must with all suppression issues, we begin by noting that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment

subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). A search pursuant to consent is one such exception. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

In this case, Sergeant Cummings testified that he discovered a cell phone in the van following Appellant's arrest.[3] As he had previously received information that Appellant had been communicating via phone during the incident, the officer testified that he then sought permission from Appellant to examine the phone. Appellant said "yes" when Sergeant Cummings asked if the cell phone belonged to him and if the officer could look at it.[4]

After Appellant was transported from the scene, Sergeant Cummings began examining the phone and found the text message that stated "I'm outside and I have my hammer with me." Given the serious nature of the offense, the officer ceased his examination and instructed Detective McCarthy to obtain a search warrant. The detective then prepared an affidavit which

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[3] The Commonwealth notes that we have not addressed whether it is necessary for an officer to obtain a search warrant in order to look through a cell phone found during a search incident to arrest. Based on Appellant's consent, we decline to address this issue at this time. *Compare State v. Nix*, 237 P.3d 842, 845 (Or. Ct. App. 2010) (upholding warrantless search of cell phone as proper search incident to arrest), *with State v. Smith*, 920 N.E.2d 949, (Ohio 2009) (holding that "an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant.").

[4] We recognize the potential for an argument as to the scope of the consent granted, i.e. that there is a distinction between "can I look 'at it'" versus "can I look 'through it'" with respect to a cell phone. However, Appellant does not make such an argument in his brief. Moreover, our review of the video record indicates that, in explaining to defense counsel how he obtained Appellant's consent during the suppression hearing, Sergeant Cummings used the phrases "at it" and "through it" interchangeably.

listed the potentially incriminating text message and a search warrant was obtained.

We believe Sergeant Cummings' testimony constitutes substantial evidence supporting the trial court's determination and that its decision was correct as a matter of law. More importantly, we reject Appellant's argument that the trial court's finding was erroneous simply because there was no indication of consent during the discovery process and no mention of consent in the search warrant affidavit. Appellant provides this Court no authority for such a proposition and fails to explain how it undermines Sergeant Cummings' testimony.

Because we reject Appellant's unsupported contentions, we uphold the admission of the evidence obtained from his cell phone.

B. Relevance of Evidence Found in the Van

Appellant next contends that the trial court abused its discretion when it admitted the contents of the vehicle in which police located him. According to Appellant, the stun gun, black mask, and handcuffs bore no relevance to the offense of wanton endangerment in this case. We agree.

We review a trial court's decision with respect to relevancy of evidence under an abuse of discretion standard. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). The test for an abuse of discretion "is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)

(citations omitted). Absent such abuse, this Court will not disturb a trial court's decision to admit evidence. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (2007).

"Relevant evidence" consists of any evidence tending to make the existence of any fact of consequence more or less probable. KRE 401. As such, "[r]elevancy is established by any showing of probativeness, however slight." *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999). If, however, no showing of probativeness can be made, then the evidence must be excluded. KRE 402 ("Evidence which is not relevant is not admissible.").

In *Major v. Commonwealth*, 177 S.W.3d 700, 710-711 (Ky. 2005), we held that "weapons, which have no relation to the crime, are inadmissible." In *Major*, the appellant confessed to shooting the victim and then disposing of the weapon. *Id.* at 706. At trial, the court allowed the prosecution to introduce a handgun, a shotgun, and a rifle owned by the appellant in a murder case "absent evidence that any of the firearms were involved in the murder . . . ." *Id.* at 710. We deemed the admission to be improper because, unlike the introduction of a weapon in other cases, the prosecution failed to establish a connection to the crime:

> We have upheld the admission of weapons into evidence based upon testimony that the weapon was the one used in the commission of the offense, *Beason v. Commonwealth,* 548 S.W.2d 835 (Ky. 1977), or that it was of the same size and shape as the weapon used in the commission of the offense, *Sweatt v. Commonwealth,* 550 S.W.2d 520 (Ky. 1977); or that it was found at the scene of the offense and was capable of inflicting the type of

injury sustained by the victim, *Barth v. Commonwealth,* 80 S.W.3d 390 (Ky. 2001).

Id.

Here, the Commonwealth introduced the contents of the vehicle driven by Appellant, including a stun gun. Appellant, though, stood accused of committing the offense of wanton endangerment for firing a gun into an occupied house. As in *Major,* we cannot discern a connection between the possession of a stun gun and the crime alleged. Notwithstanding an improper inference as to Appellant's character,[5] the discovery of the stun gun in the van, without more, does not make it more likely that Appellant fired a gun into the home in this case.

Besides the stun gun, the Commonwealth introduced a black mask and handcuffs, both of which were also found in the van. Although neither item would generally be considered a weapon, the overarching principle of our decision in *Major*—that the prosecution must establish a connection between the evidence and the crime—applies with equal force. Again, finding the black mask and handcuffs does not make it more likely that Appellant fired a gun into the home.

Although we agree that the trial court erred with respect to the admission of the contents of the van, Appellant is not entitled to relief because the error was harmless. RCr 9.24. We follow the harmless error standard set

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[5] Based upon his possession of the stun gun, the jury might assume, for instance, that Appellant is predisposed to committing violent crimes. *See* KRE 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .").

forth by the United States Supreme Court in *Kotteakos v. United States*, 328 U.S. 750 (1946), when evaluating non-constitutional errors:

> A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Winstead v. Commonwealth, 283 S.W.3d 678, 688-689 & n.1 (Ky. 2009) (citations omitted).

We do not believe the admission of the stun gun, black mask, and handcuffs had a substantial influence, as the remaining evidence in this case overwhelmingly pointed to Appellant's guilt. Jeremy Williams testified that he had seen a man fire "a couple of rounds" into the residence and that he then saw the same man standing with the woman who lived next door, in her driveway, on April 29, 2010; Officer Marksbury observed Appellant standing with McDonald at her residence on that date. Brian Hite testified that he saw Appellant at the scene on the morning of the shooting after hearing four bangs he believed to be gun shots. And both Williams and Hite testified that the man walked back and forth while talking on the cell phone, as well as linked him to a dark-colored van. Officers later located Appellant in a van matching their description approximately a quarter of a mile from the location of the shooting that morning.

The jury also heard a 911 recording in which Herron identified the shooter as her sister's ex-boyfriend "Tim." In addition, Officer Fern testified that Herron said that Appellant was McDonald's ex-boyfriend and that he was at the residence because he was upset McDonald had a new boyfriend. Most importantly, Officer Embry testified that Herron had earlier identified Appellant as the shooter and both Officers Fern and Embry indicated that she did not appear intoxicated at the time.[6]

Finally, the contents of Appellant's cell phone indicated his guilt. Thirty-eight calls were made from Appellant's cell phone to McDonald's phone on the morning in question. Furthermore, fourteen text messages were also sent from Appellant's phone, including messages that stated "I got my hammer. I'm outside."; "I'm still out here."; and "So you turned the light off. Ha! Ok."

Because there was no substantial possibility that the verdict was swayed by the admission of the items discovered in the van, we consider this error to be harmless and therefore decline to grant Appellant any relief.

C. Sufficiency of the Evidence

Appellant finally argues that the trial court erred when it failed to grant a directed verdict due to an insufficiency of evidence as to each of the four counts

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[6] In Kentucky, a prior inconsistent statement can be used as substantive evidence. *Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997); *See also* KRE 801A(a)(1). Herron testified that she was "really drunk" on the morning of the incident and did not remember many of the previous statements she made to Officers Fern and Embry. As a result, she denied that she knew the identity of the shooter and stated that she did not remember telling the officers that Appellant was jealous of McDonald's new boyfriend. Based upon this inconsistent testimony, the jury could consider the testimony of Officers Fern and Embry as substantive evidence to establish Appellant as the shooter.

of wanton endangerment.[7] This Court outlined the standard by which a trial court should evaluate a motion for a directed verdict in *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991):

> [T]he 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.

For our purposes, "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." *Id.* (*citing Commonwealth v. Sawhill,* 660 S .W.2d 3 (Ky. 1983)); *See also Beaumont v. Commonwealth,* 295 S.W. 3d 60 (Ky. 2009). Thus, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham,* 816 S.W.2d at 187-88. However, we reemphasize that an evaluation of the sufficiency of evidence depends on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont,* 295 S.W. 3d at 68 (*citing Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

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[7] Appellant concedes that this alleged error may not have been properly preserved for review and alternatively requests palpable error review pursuant to RCr 10.26. However, we need not apply RCr 10.26, as sufficient evidence supports each of the four counts.

Appellant contends that the prosecution failed to put forth adequate evidence of the location of the four victims during the shooting. According to Appellant, merely being within the same four walls at the time of a shooting does not endanger a person's life, unless there is at least some proof of proximity to the path of the bullet. Simply put, Appellant posits that the prosecution did not prove that any of the individuals were endangered when the bullet entered the residence. We disagree.

Under KRS 508.060, a person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person. According to the Commentary to the statute, the offense can best be described by use of the hypothetical situation wherein a defendant, with no intent to kill or injure but with an awareness of the risk involved, shoots a gun into an occupied building, thereby consciously disregarding the risk of death or injury to its occupants.[8]

In *Paulley v. Commonwealth*, 323 S.W.3d 715, 724 (Ky. 2010), the appellant had been found guilty of nine counts of wanton endangerment—one count for each person present in the home when he shot a gun through the front door. Based upon this Court's previous decision in *Hennemeyer v.*

[8] Of course, the defendant's conduct would constitute a greater offense if a person had been killed or suffered serious injury as a consequence of the shooting.

Commonwealth, 580 S.W.2d 211 (Ky. 1979),[9] we adopted the conclusions and analysis of the Court of Appeals' opinion in *West v. Commonwealth*, 161 S.W.3d 331 (Ky. App. 2004):

> In *West v. Commonwealth*, [161 S.W.3d at 336,] a defendant was charged with seven counts of wanton endangerment based upon the seven people who were in the homes into which the defendant fired. Similarly to [the appellant], the defendant in *West* argued he should only have been charged with three counts of wanton endangerment since he only fired three shots. After analyzing precedent and the wanton endangerment statute, KRS 508.060, the Court of Appeals concluded "the shootings which endangered seven persons in total could be charged as seven separate offenses of wanton endangerment." [*Id.* at 337.]

Paulley, 323 S.W.3d at 724 (footnotes omitted). As a result, we rejected the appellant's argument that the trial court erred in refusing to grant a directed verdict on the nine counts.[10] *Id.*

Based upon our precedent, as well as the plain language and Commentary to KRS 508.060, we do not believe the Commonwealth was required to show that the victims were in the immediate path of the bullets. Neither the Commentary nor *Paulley* discusses the location of the occupants or the path of the bullets. Negative implication, as well as common sense, compel us to conclude that the act itself of firing into an occupied residence creates the

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[9] In *Hennemeyer*, 580 S.W.2d at 215, this Court noted that KRS 508.060 "was designed to protect each and every person from each act coming within the definition of the statute. It is not a statute designed to punish a continuous course of conduct."

[10] In *Paulley*, 323 S.W.3d at 718, we vacated the convictions because the trial court improperly failed to grant a request to strike a juror for cause. As a result, our opinion addressed issues that were necessary for guidance upon remand, including whether the trial court erred in refusing to grant a directed verdict on the nine counts of wanton endangerment. *Id.* at 719, 724.

requisite substantial danger of death or serious physical injury to another person. As a result, we hold that the prosecution can meet its obligation to produce "more than a mere scintilla of evidence" with respect to KRS 508.060 by simply putting forth evidence that the defendant, with no intent to kill or injure but with an awareness of the risk involved, fires a gun into an occupied building.

Here, the Commonwealth produced evidence that Appellant fired a gun into a residence occupied by four people. When police arrived on the scene, four individuals—McDonald, Herron, Peters, and Brown—exited the home. Herron testified that she was in the residence at the time of the shooting and was awakened by McDonald. In addition, Officer Fern testified that Herron told him she hid in the bathroom with McDonald's new boyfriend and his acquaintance at the time of the shooting.[11] In sum, the Commonwealth met its obligation to provide "more than a mere scintilla of evidence" that four persons occupied the residence when the shooting occurred.

Because the Commonwealth put forth evidence that the residence was occupied by four persons during the shooting, the trial court did not err in refusing to grant a directed verdict as to each of the four counts of wanton endangerment.

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[11] As noted, a prior inconsistent statement can be used as substantive evidence. *See supra* note 6. Herron testified that she hid in the closet after McDonald woke her up, which was inconsistent with her statement that she hid in the bathroom with McDonald's new boyfriend and his acquaintance at the time of the shooting. As a result, the testimony of Officer Fern relating Herron's earlier statement could be used as substantive evidence to establish the number of persons in the residence during the shooting.

III. Conclusion

For the foregoing reasons, Appellant's wanton endangerment convictions and corresponding twenty-year prison sentence are affirmed.

All sitting. Minton, C.J.; Abramson, Schroder, and Venters, JJ., concur. Scott, J., concurs in result only by separate opinion in which Cunningham, J., joins. Noble, J., dissents because the admission of the ski mask, stun gun, and handcuffs was not harmless error.

SCOTT, J., CONCURRING IN RESULT ONLY: While I fully concur as to the admission of the evidence obtained from the cell phone and the sufficiency of evidence supporting each count of wanton endangerment, I concur in result only with respect to the relevance of the stun gun, black mask, and handcuffs.

Although I concede that Appellant's possession of a stun gun, black mask, and handcuffs does not make it more likely that a gun was fired into the residence, this was not the fundamental basis for dispute at trial; rather, the Commonwealth primarily sought to *connect Appellant to the shooting*, and the possession of these items, in light of their spatial and temporal proximity to the incident,[12] makes it more likely that it was Appellant who fired the gun into the residence as he attempted to kidnap either McDonald or her new boyfriend, which was the prosecutorial theory of the case. Simply put, the majority's application of KRE 401 ignores that relevant evidence includes "evidence having any tendency to make the existence of any fact that is of consequence to

[12] The stun gun, black mask, and handcuffs were found in a van occupied by Appellant approximately a quarter of a mile from the location of the shooting that same morning.

the determination of the action more probable or less probable" and thus inhibits the Commonwealth from setting forth a coherent narrative.

Because the trial court did not abuse its discretion with respect to its ruling on relevancy, I concur in result only.

Cunningham, J., joins.

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