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RENDERED: MAY 23, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000680-MR

RYAN KRISTOFF — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF
NO. 11-CR-00015

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Ryan Kristoff was convicted in Christian Circuit Court of murder, wanton endangerment, aggravated DUI, failure to maintain required insurance, failure to wear seat belts, and speeding. He was sentenced to twenty years' imprisonment. He raises three issues on appeal. Because the trial court did not commit reversible error, the Court hereby affirms Appellant's convictions and sentence.

I. Background

On January 13, 2010, Appellant was driving a vehicle on Canton Road in Christian County, Kentucky. His vehicle collided with another vehicle driven by Norma Cook. Norma's husband, Jack Cook, was a passenger in her vehicle. Norma died as a result of the collision and Jack survived with minor injuries.

Earlier that day, Appellant had returned to the United States on leave following military service in Iraq, where he was a driver for the Army. He went

to his girlfriend's father's house to pick up his vehicle, which he had stored there while in Iraq. While he was there, he consumed alcohol.

By the time Appellant left the house in the vehicle, it had gotten dark outside and there were no streetlights. As he went through a sharp curve in the road, he crossed at least two feet over the center double-yellow no-passing line and struck the vehicle driven by Norma nearly head on.

Analysis of the crash site and the crash data recorder recovered from Appellant's vehicle revealed that he was driving 89 miles per hour two seconds before the collision and 86 miles per hour one-tenth of a second before the collision. Data showed that Appellant did not apply his brakes before the collision.

Norma's vehicle was traveling 43 miles per hour when the collision occurred. The posted maximum speed limit on the road was 55 miles per hour, with an advisory speed limit of 40 miles per hour at the curve.

Appellant was administered two blood alcohol tests, one at the scene and another at the hospital where he received treatment for his injuries. The first test showed a blood alcohol content (BAC) of 0.1 and the second showed a BAC of 0.126, both above the legal limit of 0.08. A Commonwealth's expert testified that Appellant's BAC at the time of the collision was between 0.09 and 0.12.

Appellant was initially indicted for second-degree manslaughter, among other charges. Following the original indictment, however, a new prosecutor was assigned to the case and a second grand jury was empanelled. The second grand jury returned a superseding indictment charging Appellant with wanton

murder, first-degree wanton endangerment, aggravated DUI, failure to maintain required insurance, failure to wear seat belts, and speeding.

Appellant was convicted of all charges. The jury recommended a sentence of twenty years' imprisonment for wanton murder, two and a half years for wanton endangerment, ninety days for aggravated DUI, and ninety days for failure to maintain required insurance. The trial court adopted the jury's recommended sentences and ordered them to run concurrently for a total of twenty years.

Appellant now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises three issues on appeal. First, he claims that the trial court erred by denying his motion for a directed verdict as to the wanton murder charge. Second, he claims that the Commonwealth's statement during its closing argument about the change from second-degree manslaughter to murder was palpable error. Third, he claims that the trial court abused its discretion by allowing improper character evidence, which amounted to palpable error.

A. Directed Verdict

Appellant claims that the trial court committed reversible error when it denied his motion for a directed verdict on the wanton murder charge. 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). The trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence; but if more evidence is produced and it would be reasonable for the jury to return a verdict of guilty, then the motions should be denied. *Id.* On appellate review, the standard is slightly more deferential; the trial court will be reversed only if "it would be *clearly unreasonable* for a jury to find guilt." *Id.* (emphasis added).

Appellant argues that the Commonwealth did not prove the elements of wanton murder under KRS 507.020(1)(b), which states that a person is guilty of murder when "[i]ncluding, but not limited to, operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." Specifically, Appellant argues that the evidence did not demonstrate that the circumstances surrounding the accident rose to the level of "extreme indifference to human life," an element that sets wanton murder apart from second-degree manslaughter. *See* KRS 507.040 (permitting conviction for second-degree manslaughter for wantonly causing the death of another person by operating a motor vehicle, but without the added element of "manifesting extreme indifference to human life").

To support his claim, Appellant cites *Brown v. Commonwealth*, 975 S.W.2d 922, 924 (Ky. 1998), where the Court noted that the characteristics of

wanton murder, as opposed to second-degree manslaughter, are: (1) homicidal risk that is exceptionally high; (2) circumstances known to the actor that clearly show awareness of the magnitude of the risk; and (3) minimal or non-existent social utility in the conduct. *Id.* at 924 (citing Lawson & Fortune, *Kentucky Criminal Law*, p. 322, § 8-2(c)(2) (1998)). He claims that the homicidal risk was not exceptionally high and that there was social utility in his driving over the center double-yellow lines.

It should first be noted that the characteristics noted in *Brown* are not a checklist of elements of wanton murder. They are merely factors a court should consider in deciding whether the proof shows the sort of aggravated wantonness required to elevate second-degree manslaughter to wanton murder. The Court has made clear that "that the trial court and the jury must examine the specific facts of each case and make a determination based on the 'totality of the circumstances.'" *Sluss v. Commonwealth*, 381 S.W.3d 215, 220 (Ky. 2012). The characteristics enumerated in *Brown* may certainly be considered by the trial court and jury as part of the "totality of circumstances," but the failure to show one or more of them does not necessarily require a directed verdict.

Additionally, the Court believes Appellant's claim that those characteristics were not present is incorrect. In fact, the proof shows at least two of them.

As to Appellant's claim that the homicidal risk was not exceptionally high, the Court has made clear that intoxication, along with other factors, can

suffice to prove the wanton murder element of "circumstances manifesting extreme indifference to human life." *See Hamilton v. Commonwealth*, 560 S.W.2d 539, 543 (Ky. 1977) (affirming wanton-murder conviction where truck driver was driving under the influence of alcohol and was speeding when he ran a stop light and collided with a car in an intersection); *see also Sluss*, 381 S.W.3d at 220; *Cook v. Commonwealth*, 129 S.W.3d 351, 362-63 (Ky. 2004). Appellant was intoxicated, driving nearly 34 miles per hour faster than the posted speed limit (and 49 miles per hour faster than the posted advisory speed limit on the curve), and driving at least two feet over the center yellow line. The risk of a fatal accident from this behavior was extremely high and manifested an extreme indifference to human life.

Moreover, Appellant's claim that there was social utility in driving in the middle of the road is disingenuous at best. He claims that there was social utility to his driving in the middle of the road while in the Army in order to avoid road-side explosives and, thus, the social utility continued when he returned to the United States, at least for a short time. He does not claim any exigency or emergency particular to his situation or the road on which he was driving. Whatever social utility existed for driving in the middle of the road while Appellant was deployed in a combat zone disappeared when he returned to Christian County, Kentucky. The danger of roadside bombs approaches zero in the United States, but the danger of an oncoming car is extremely high. Absent emergency circumstances, this Court can see *no* social utility in crossing the double-yellow center line of a domestic road.

The Commonwealth introduced evidence that Appellant was intoxicated, driving significantly faster than the posted speed limit, and driving in the middle of the road in a sharp curve. It would not have been clearly unreasonable for the jury to find Appellant guilty of wanton murder, and therefore the trial court did not abuse its discretion by denying Appellant's motion for a directed verdict.

B. Statements During Closing Arguments

As noted above, Appellant was originally charged with second-degree manslaughter. A new prosecutor sought and received a superseding indictment for wanton murder from a second grand jury. At trial, Appellant's counsel called attention to the changed indictment when he asked Deputy Moe, the officer who investigated the incident, whether the evidence had changed between the first and second times he had presented the case to the grand jury. During closing arguments, the Commonwealth responded to the issue of the changed indictment:

> Murder. It's my fault the charge changed. My fault. Not Deputy Moe's, not anyone else's. Two prosecutors before me had this case before it got to this office, and they decided to do something different. I can't control them. And in Christian County, the prosecutors typically tell the law enforcement what kind of charge to do if the law enforcement comes to them asking about it. I can't address it. I can't explain it. Except to say that it fits murder. Not cold-blooded intentional murder. The judge read you the instruction for murder, and that's not the kind of murder I am talking about. This is the kind of murder I am talking about: operation of a motor vehicle under circumstances manifesting extreme indifference, extreme indifference to human life.

Appellant claims that the Commonwealth impermissibly expressed a personal opinion as to the truth or falsity of evidence of Appellant's guilt when he stated that the murder charge "fits."

Appellant admits that the issue is unpreserved, and requests that the court conduct a palpable error review. Palpable error occurs when the substantial rights of a defendant are violated and a manifest injustice results. RCr 10.26. As we have noted, palpable error's requirement of manifest injustice requires "showing ... [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Elsewhere in that decision, we stated that the rule required deciding "whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Id.* at 4.

A prosecutor "may not testify" and "is limited to fair argument on matters in the record and legitimate deductions therefrom." *Bowler v. Commonwealth*, 558 S.W.2d 169, 172 (Ky. 1977). "[I]t is not [the Commonwealth's] duty to make a statement of fact, the credence of which is always more or less strengthened by his official position, outside of the record or evidence, which may tend in the least degree to prejudice the rights of the accused." *Holt v. Commonwealth*, 219 S.W.3d 731, 731 (Ky. 2007).

In making comments during closing arguments, the Commonwealth simply responded to questions and comments posed by Appellant's counsel about the change in charges against Appellant. The Commonwealth did not mention the superseding indictment at any point prior to the Appellant's

questioning of Deputy Moe, and its statement was brief. The statements made by the Commonwealth were not improper, as they were in response to issues raised by Appellant's counsel. Because this Court holds that the statements were not error, they necessarily do not rise to the level of palpable error contemplated by RCr 10.26.

C. Character Testimony

At trial, the Commonwealth introduced testimony from Military Police Officer Jeffrey Odie, who was assigned as Appellant's supervisor in the United States Army after the collision occurred. Odie testified that Appellant initially accepted responsibility for the collision, but later began to act like he would fight the charges upon learning that he did not have insurance.[1] He further testified that Appellant threatened to declare bankruptcy so there would be no money to pay out and that he was drinking alcohol prior to the accident. Appellant claims that this testimony was irrelevant, unduly prejudicial, and impermissible character evidence under KRE 404(a). Appellant again concedes that this issue is unpreserved and requests palpable error review pursuant to RCr 10.26.

Appellant asserts that the testimony does not prove an element of an offense, or to disprove a defense. *See Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999). But in addition to murder, Appellant was on trial for failure to maintain required insurance and operating a motor vehicle under the influence of alcohol. A substantial portion of Odie's testimony focused on

[1] Apparently, there was also a civil lawsuit. Otherwise, Odie's statements about insurance do not make sense here.

Appellant's admissions that he did not have insurance at the time of the offense and his consumption of alcohol prior to driving. This testimony thus went directly to proving the key elements of those offenses. Additionally, Appellant was charged with wanton murder based in part on his consumption of alcohol prior to driving. Thus, Odie's testimony about Appellant's admissions also went to proving an element of that offense.

Odie's testimony regarding Appellant's threats to declare bankruptcy was error. The evidence is not relevant to this case under KRE 401 given the offenses with which Appellant was charged. The testimony also raises a question about whether it was admissible character evidence under KRE 404(a). Regardless, the Court is confident that the brief testimony on that subject did not violate Appellant's substantial rights and no manifest injustice occurred so as to require reversal. RCr 10.26.

III. Conclusion

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

All sitting. All concur.

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