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RENDERED: FEBRUARY 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000158-MR

JEFFERY JOHNSON — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 11-CR-00175

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Jeffery Johnson of second-degree escape, first-degree criminal mischief, and of being a first-degree persistent felony offender (PFO). The trial court sentenced Johnson to five years' imprisonment for the escape conviction and three years' imprisonment for the criminal mischief conviction. Both sentences were enhanced to twenty years as a result of the PFO conviction and were ordered to be served concurrently. Johnson appeals from the resulting judgment as a matter of right.[1]

Johnson alleges that the trial court erred by (1) failing to instruct the jury on voluntary intoxication and (2) denying his motion for a directed verdict for the first-degree criminal mischief charge.

Finding no error, we affirm the conviction.

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[1] Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL HISTORY.

Jeffery Johnson was in the driveway of an acquaintance's residence when law enforcement officers arrived to execute a warrant to search the premises. Among the officers at the scene was Deputy Jason Back, who momentarily detained Johnson while he ran a records check for warrants. Deputy Back discovered an outstanding felony warrant against Johnson for a flagrant non-support charge. So he arrested Johnson and placed him in the rear of his locked cruiser while the search of the premises continued.

When Deputy Back returned to his vehicle with another arrestee, Johnson had escaped and the door and backseat of the vehicle were damaged. Johnson remained at large that evening but was later found and arrested. Johnson was charged with first-degree criminal mischief, second-degree escape, and being a first-degree PFO.

At trial, Deputy Back testified that when escaping from custody, Johnson caused extensive damage to his cruiser. He also testified that the repairs necessitated by Johnson's escape cost $1,200 and took approximately three hours to complete. The Commonwealth did not produce a receipt to document the cost of the repairs.

Johnson painted a different picture of the events surrounding his escape. He admitted to escaping from the cruiser but attempted to blame his actions on paranoia caused by his methamphetamine use. Johnson also contested the extent of damage to the cruiser. He stated that the backseat of the cruiser was already damaged when he was placed there and that he merely tapped the

window screen, causing it to fall, allowing him to reach through the window opening and open the door.

The jury convicted Johnson of all charges, recommending a five-year sentence for escape and a three-year sentence for criminal mischief, both enhanced to twenty years as a result of the PFO conviction. The jury also recommended the sentences be served concurrently, and the trial court entered judgment consistent with the jury's recommendation. This appeal followed.

II. ANALYSIS.

A. The Trial Court's Failure to Give a Voluntary Intoxication Instruction is not Subject to Judicial Review.

Johnson first argues that the trial court erred in failing to instruct the jury regarding voluntary intoxication. He claims that he was under the influence of methamphetamine at the time he committed the charged offenses and that he provided enough evidence to allow a jury to find that his methamphetamine intoxication negated the requisite mental state necessary to convict him of second-degree escape and first-degree criminal mischief.

In order for an assignment of error regarding the giving or failure to give a jury instruction to be subject to appellate review, Kentucky Rules of Criminal Procedure (RCr) 9.54(2) requires the party's position to have been "fairly and adequately" presented to the trial judge. Nonetheless, Kentucky courts have routinely allowed aggrieved appellants relief from RCr 9.54(2)'s preservation requirement by allowing unpreserved instructional errors to be reviewed under

the more stringent substantial-error analysis.[2] But this pathway to appellate review was recently narrowed significantly by *Martin v. Commonwealth*.[3] In *Martin*, we interpreted RCr 9.54(2) to foreclose *all* appellate review, including substantial-error review, of assignments of error alleging that a trial court should or should not have given a specific jury instruction when such error was not properly preserved by "fairly and adequately" presenting the issue to the trial court.[4]

Johnson insists that this issue was preserved for judicial review by his counsel's request for such an instruction during trial. The Commonwealth, on the other hand, argues that the issue was not properly preserved because Johnson's trial counsel requested an involuntary intoxication instruction. Admittedly, the record at the point of defense counsel's statements to the trial court lacks clarity of sound. But upon careful review, we are satisfied that the Commonwealth's view of the record is correct. Johnson's attorney did in fact request an *involuntary* intoxication instruction as opposed to the *voluntary* intoxication instruction he is now seeking on appeal.

Johnson nonetheless argues that the issue was fairly and adequately presented to the trial court because—regardless of the articulation of the request—the trial court and the Commonwealth understood his motion as

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[2] *See* RCr 10.26.

[3] 409 S.W.3d 340 (Ky. 2013).

[4] We note RCr 9.54(2), as interpreted by *Martin*, does not operate to prevent substantial-error review of unpreserved challenges to the *content* of an instruction that was otherwise properly given by the trial court. *Smith v. Commonwealth*, 410 S.W.3d 160, 167 (Ky. 2013).

requesting a voluntary intoxication instruction. We find that an appellate court making presumptions regarding a trial court's understanding of a defendant's motion to be a slippery slope upon which we decline to tread. This slope is rendered more slippery when the proffered understanding of the trial court is contrary to the literal words of the movant's motion. In this instance, we find that Johnson's request for a voluntary intoxication instruction was not fairly and adequately presented to the trial court; and RCr 9.54 forecloses appellate review of the alleged error.

Even if we disregard the lack of preservation, we nonetheless must find that Johnson was not entitled to a voluntary intoxication instruction. It is well-settled law that a trial court must instruct the jury on every theory of the case and affirmative defense that a juror could reasonably conclude from the evidence presented at trial.[5] We review a trial court's decision regarding the giving of a jury instruction under the abuse-of-discretion standard.[6]

Under KRS 501.080(1), voluntary intoxication is only available as an affirmative defense if it "negatives [sic] the existence of an element of the offense[.]" This Court has further interpreted this statute to require "evidence reasonably sufficient to prove that the defendant was so [intoxicated] that he did not know what he was doing" in order to justify an instruction on the defense.[7]

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[5] *See, e.g., Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010); *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007).

[6] *Harris*, 313 S.W.3d at 50.

[7] *Id.* (citing *Fredline*, 241 S.W.3d at 797.

Here, Johnson presented evidence that he was under the intoxicating influence of methamphetamine at the time of his arrest; and this intoxication caused him to experience an unreasonable fear of harm when placed in Deputy Back's cruiser. Acting on this fear, Johnson escaped from the police cruiser causing damage to the vehicle in the process.

This evidence is not sufficient for a jury to draw an inference that Johnson did not know what he was doing in the course of escaping and damaging the police cruiser. In fact, while Johnson's testimony makes clear that his methamphetamine intoxication amplified his urge to escape from custody, his reasoned recollection of the events surrounding his arrest and escape supports a finding that he knowingly and intentionally selected the means of quelling his fear by escaping from custody.

This understanding of Johnson's level of intoxication is buttressed by Deputy Back's testimony. He testified that Johnson did not appear to be agitated or under the influence of any substance at the time of his arrest. It is clear that this is not a situation similar to the one contemplated in *Nichols v. Commonwealth*,[8] where a voluntary intoxication instruction was required where the defendant had been heavily drinking and, as a result, was "acting wild" and "out of control." Instead, this case is more akin to that presented in *Stanford v. Commonwealth*,[9] where a defendant's consumption of alcohol and

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[8] 142 S.W.3d 683, 689 (Ky. 2004).

[9] 793 S.W.2d 112 (Ky. 1990).

cocaine before committing an offense was insufficient to merit a voluntary intoxication instruction where the defendant was still able to drive.

Therefore, we find that the trial court was correct in labeling Johnson's methamphetamine usage as merely an agitating factor in his crimes as opposed to a causative factor that would negate the required mental state. As such, the trial court did not abuse its discretion in denying Johnson's request for a voluntary intoxication instruction.

B. Johnson was not Entitled to a Directed Verdict.

Johnson next argues that the trial court erred in denying his motion for directed verdict on the first-degree criminal mischief charge.[10] This issue is properly preserved for review.[11] Finding that the Commonwealth produced sufficient evidence to support Johnson's conviction, we affirm the trial court's denial of his motion for a directed verdict.

When ruling on a directed-verdict motion, a trial court must assume the evidence produced by the Commonwealth to be true and "must draw all fair and reasonable inferences . . . in favor of the Commonwealth."[12] Yet, the trial court must be careful to "reserv[e] to the jury questions as to the credibility and

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[10] "A person is guilty of criminal mischief in the first degree when, having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of $1,000 or more." KRS 512.020.

[11] This argument is preserved for appeal by Johnson's motion for directed verdict being presented at the close of the Commonwealth's evidence and then the motion's renewal upon the close of evidence. *See Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (citing *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998)).

[12] *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

weight to be given to such testimony."[13] Upon appellate review, a trial court's denial of a directed verdict motion will be reversed only if, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]"[14] This requires evidence of substance, and the Commonwealth is required to present more than a mere scintilla of evidence.[15]

Johnson contends he is entitled to a directed verdict on the first-degree criminal mischief charge because there was insufficient evidence to show that he caused more than $1,000 worth of damage to Deputy Back's cruiser. He claims that the Commonwealth's failure to provide a receipt indicating the cost of repairs or pictures detailing the damage was fatal. We disagree.

The Commonwealth's only evidence regarding the damage was the testimony given by Deputy Back. He testified that his cruiser was in good condition and good working order at the time he placed Johnson in it. As a result of Johnson's escape, Deputy Back testified that his cruiser sustained the following damage: a bracket to a rear-mounted radar system was torn, the backseat was torn, the rear passenger door screen was pried off of the door panel, a piece of quarter-glass was knocked out of the rear door, the rear passenger window was shoved down into the door, and the rear passenger door was severely bowed. Deputy Back further testified that the repairs cost $1,200 and took three hours to complete at a local body shop.

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[13] *Id.*

[14] *Id.* (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

[15] *Benham*, 816 S.W.2d at 187-88.

The only evidence to rebut Deputy Back's testimony came from the testimony of Johnson himself. Johnson testified that the vehicle was not in perfect condition when Deputy Back arrived at the scene. He further testified that when he was placed into the vehicle, the rear window was down; and he simply touched the quarter-glass window, which fell off, allowing him to reach outside and open the door.[16]

The jury heard conflicting evidence regarding the extent of the damage caused to the cruiser; and "[i]t is elementary that even when the evidence is contradictory, the credibility of witnesses and the weight to be given to sworn testimony are for the jury to decide."[17] We find that Deputy Back's testimony was sufficient to allow a reasonable jury to conclude that Johnson caused more than $1,000 worth of damage to the cruiser and that the jury reasonably did so here. The trial court did not err by denying Johnson's directed verdict motion.

III. CONCLUSION.

Based on the foregoing, we find that the trial court did not err and affirm the judgment of conviction and sentence.

All sitting. All concur.

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[16] This testimony was rebutted by Deputy Back, who testified that the doors on his cruiser were locked while Johnson was in the backseat; and the only way the rear door could have been opened was if it were unlocked using the electronic mechanism located in the driver's side door.

[17] *Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002). It appears clear that the jury undertook the responsibility of weighing the credibility of witnesses presented before it by contemplating the varying degrees of criminal mischief that were presented to them in the instructions. The jury convicted Johnson of first-degree criminal mischief, thereby finding that he caused more than $1,000 in damage, as opposed to the lesser-included offenses of second-degree criminal mischief (requiring damage to exceed $500) or third-degree criminal mischief (which does not require any finding regarding pecuniary damage) that were also available to them.

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