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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000499-MR

ROBERT J. WADDELL — APPELLANT

V.

ON APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
NO. 12-CR-00102

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In August of 2012, Appellant, Robert J. Waddell, was an inmate at the Breckinridge County Detention Center resulting from a felony charge unrelated to the present case. Around 9 p.m., on the evening of August 30, 2012, Waddell was transported from the detention facility to a local hospital in Breckinridge County after complaining of chest pains. The transport was properly approved by a jail nurse. Waddell testified at his trial that he was addicted to alcohol and methamphetamine and had previously suffered several heart attacks as a result.

Deputy Joe Morgan was assigned to transport Waddell to the hospital. Morgan handcuffed, shackled, and then placed Waddell in the back of the jail transport van which was equipped with a caged area. No other prisoners were

transported along with Waddell. Deputy Morgan was not armed with a firearm, as he was not authorized to do so. Nor did he have a taser.

After arriving at the hospital, Deputy Morgan removed Waddell from the van and escorted him to the emergency room. Waddell remained handcuffed and shackled. Once inside, Waddell was placed in a hospital room where multiple medical personnel spoke with him regarding his symptoms. Deputy Morgan uncuffed one of Waddell's hands so that he could be treated and then cuffed the other hand to the bed. During his treatment, Waddell was administered morphine and other medications.

While in the emergency room, Waddell repeatedly requested that Deputy Morgan get him a Coke. Morgan agreed and left Waddell unattended for approximately two to three minutes to retrieve the beverage. Around this time, Waddell purchased several cigarettes from one of the nurses, even though prisoners are not permitted to have cash. After Waddell was discharged from the hospital, he and Deputy Morgan walked back toward the jail transport van. They attempted to return to the hospital to get Waddell a light for one of his cigarettes, but they were denied re-entry. The two men then walked back to the van.

While Deputy Morgan was attempting to unlock the right side van door, Waddell pinned the officer against the side of the van and placed a sharp object to his abdomen. When the deputy inquired as to what Waddell was doing, Waddell demanded the handcuff keys and repeatedly stated, "Look at what I got." It was dark outside and Morgan never saw the object. Deputy Morgan

gave Waddell the keys to both the handcuffs and the van. Waddell then shoved Morgan inside the caged area of the van from which he could not escape. After unlocking his restraints, Waddell abruptly drove away with Morgan in tow.

During the flight, Waddell ordered Morgan not to use his handheld radio which the deputy still had with him. Morgan later testified that he believed the radio was out of range for communication. Waddell told Morgan that he would not hurt him unless Morgan "did something stupid." Approximately ten to fifteen minutes later, Waddell stopped the van and released Morgan after taking his boots and radio. The inmate then drove away.

Deputy Morgan walked bootless down a gravel road and eventually located a house around 1:00 a.m. Once he arrived, Morgan spoke with one of the homeowners, Victoria Kelley. Ms. Kelley testified that Morgan was very fatigued and nervous and stated that he had been kidnapped by an inmate. He was not physically injured. Police eventually arrived at the scene and took Deputy Morgan with them.

It appears from the record that the van was discovered the next day, August 31, 2012, in the edge of a cornfield near a road. Waddell was located on September 1, 2012, walking down a highway located in a remote area of Breckinridge County where he was apprehended by the police without incident.

Waddell was indicted by a Breckinridge County grand jury on charges of theft by unlawful taking or disposition of property over $500; kidnapping-adult; first-degree escape; third-degree assault; and being a first-degree persistent felony offender ("PFO"). The Breckinridge Circuit Court was unable to empanel

a jury due to pretrial publicity in Breckinridge County. The case was accordingly tried in the Meade Circuit Court. Meade, Breckinridge, and Grayson counties are located within the Forty-Sixth Judicial Circuit. A Meade Circuit Court jury found Waddell guilty of all charges except third-degree assault, which was dismissed during trial. With the PFO enhancement, the trial court imposed the jury's recommended total sentence of twenty years imprisonment. Waddell now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Two issues are raised and addressed as follows.

Jury Instructions

Waddell argues that the trial court erred in denying his request for jury instructions for the lesser-included offenses of first and second-degree unlawful imprisonment and third-degree escape. The latter was not developed in Waddell's briefs and will not be addressed. "Lesser-included offense instructions are proper if the jury could consider a doubt as to the greater offense and also find guilt beyond a reasonable doubt on the lesser offense." *Parker v. Commonwealth*, 952 S.W.2d 209, 211 (Ky. 1997) (citing *Skinner v. Commonwealth*, 864 S.W.2d 290 (Ky. 1993)). When reviewing claims of error in failing to give a jury instruction, we consider the evidence in the light most favorable to the moving party. *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005).

Kidnapping

Our analysis begins with KRS 509.040, which states in pertinent part as follows:

> (1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
>
> (a) To hold him for ransom or reward; or
> (b) To accomplish or to advance the commission of a felony; or
> (c) To inflict bodily injury or to terrorize the victim or another; or
> (d) To interfere with the performance of a governmental or political function; or
> (e) To use him as a shield or hostage; or
>
> . . . .

The record in this case strongly supports a finding that Waddell restrained Deputy Morgan with the intent to escape from custody. In fact, Waddell was convicted of escape in the first degree, which is a Class C felony. KRS 520.020(2). Thus, the evidence supported a finding of guilt for the charge of kidnapping under KRS 509.040(b).

In support of his argument, Waddell asserts that there was insufficient evidence presented concerning the existence of the sharp object placed at Morgan's abdomen. Waddell further contends that Deputy Morgan "may have, in some form, consented or acquiesced to this impingement on his liberty." Waddell's arguments are unconvincing.

Kelly Williams, a registered nurse who was present at the hospital when Waddell was being treated, testified that she was uncertain whether there were sharp instruments near Waddell during his stay. Williams further testified that

Waddell was treated by several medical personnel, each of whom would have brought his or her own equipment into the room where Waddell was located. Further, Chief Nurse Angela Portman testified that she was unable to determine whether anything had been removed from the emergency room that night.

The use of a weapon, enhanced physical force, or threat thereof, is not requisite for a conviction under the kidnapping statute. KRS 509.040 merely requires the unlawful restraint of another. Furthermore, the kidnapping exemption does not apply here. *See* KRS 509.050 ("The exemption provided by this section is not applicable to a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape."). Therefore, the existence or the lethal nature of the object placed at Deputy Morgan's abdomen is not dispositive.

Waddell also fails to provide any actual evidence that Deputy Morgan's failure to resist somehow constitutes consent or acquiescence to his confinement. Waddell's argument appears to be premised entirely on his trial counsel's accusations proffered during opening statements. Moreover, it defies credulity that, upon his detention, Deputy Morgan suffered from the instant onset of Stockholm Syndrome. The law is clear that "it is the privilege of the jury to believe the unbelievable if the jury so wishes." *Mishler v. Commonwealth*, 556 S.W.2d 676, 680 (Ky. 1977). However, the trial court is not required to instruct the jury on a theory with no evidentiary foundation. *Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky. 2003). No sufficient

evidentiary bases for the alternative jury instructions were presented in the present case. Accordingly, the trial court correctly refused to instruct on the lesser-included offenses.

Directed Verdict

Waddell further argues that the trial court erred in denying his motion for a directed verdict of acquittal for the offense of theft by unlawful taking or disposition of property over $500. This charge resulted from the undisputed facts that Waddell drove away from the hospital in the jail van and then abandoned it.

We will reverse the trial court's denial of a motion for directed verdict "if under the evidence as a whole, it would be *clearly unreasonable* for a jury to find guilt[.]" *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky. 1983) (emphasis added)). When ruling on a directed verdict motion, the trial court must assume that the Commonwealth's evidence is true. *Benham,* 816 S.W.2d at 187. Our review is confined to the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth,* 354 S.W.3d 565, 575 (Ky. 2011).

A person is guilty of theft by unlawful taking or disposition of property when he unlawfully "[t]akes or exercises control over movable property of another with intent to deprive him thereof[.]" KRS 514.030(1)(a). KRS 514.010(1) defines "deprive" as follows:

> (a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or

> with intent to restore only upon payment of reward or other compensation; or (b) To dispose of the property so as to make it unlikely that the owner will recover it.

Waddell argues that he did not intend to deprive the jail of its van, either permanently or for an extended period of time. In support, Waddell asserts that the van was found in clear view of the road, unharmed, with the keys still in the ignition. Waddell further contends that the charge of unauthorized use of a motor vehicle would have been more appropriate because it omits the intent element present in KRS 514.030. However, Waddell failed to tender a jury instruction for the unauthorized use of a motor vehicle offense and therefore forecloses our review of that issue. *Martin v. Commonwealth*, 409 S.W.3d 340, 345-47 (Ky. 2013) ("RCr 9.54(2) bars palpable error review for unpreserved claims that the trial court erred in the giving or the failure to give a specific instruction."). In any event, merely instructing the jury as to that crime would have had no bearing on the reasonableness of a jury verdict convicting Waddell of theft by unlawful taking.

We agree with Waddell that KRS 514.030 contemplates some level of deprivation that exceeds a momentary or fleeting appropriation of property. However, the commentary to that statute provides that it "is intended to include all statutory and common law offenses involving unlawful appropriation of property." KRS 514.030. One of the statutory offenses cited is the former KRS 434.370, entitled "Abandonment or failure to return motor vehicle." *See Commonwealth v. Day*, 599 S.W.2d 166, 167 n.2 (Ky. 1980); *see also Byrd v. Commonwealth*, No. 2007-SC-000706-MR, 2008 WL 5051612, at

* 4 (Ky. Nov. 26, 2008) ("Appellant was clearly exercising control over a car that was not his, which is sufficient to satisfy [KRS 514.030].").

The record demonstrates that Waddell used the van to effect his escape from law enforcement authorities and then abandoned the vehicle in a cornfield. The van was not discovered by authorities until at least a day after Waddell's flight. When ruling on the directed verdict motion, the trial court specifically noted that law enforcement officers were unaware of the van's location and were fortunate to find it. Reviewing the evidence as a whole, it was not clearly unreasonable for the jury to convict Waddell of theft by unlawful taking or disposition of property over $500.

Conclusion

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

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

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