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RENDERED: SEPTEMBER 30, 2021
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2020-SC-0059-MR

SHERMAN DENNY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 19-CR-00774

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Sherman Denny (Denny) was found guilty of wanton endangerment in the first degree, fleeing or evading police in the first degree, and of being a persistent felony offender in the first degree. He now appeals his resulting twenty-year sentence to this Court as a matter of right.[1] After review, we affirm.

I. FACTUAL BACKGROUND

Denny's first assertion of error concerns the trial court's actions after voir dire. Denny's second assertion of error concerns the sufficiency of the evidence against him. A thorough recitation of the underlying facts is therefore necessary.

[1] Ky. Const. § 110(2)(b).

On the morning of March 25, 2019, Denny was parked next to a gas pump at Thornton's Gas Station located at the corner of Elkhorn Road and Buena Vista Road in Lexington, Kentucky.

Denny had several outstanding warrants unrelated to the circumstances in the case at bar, and had become familiar to police after gaining local notoriety for approaching people in Fayette County to ask for money to pay for his insulin. Someone who recognized Denny made a call to report his location. Benjamin Fielder (Ofc. Fielder), an officer with the Lexington Police Department, was dispatched to the area to locate Denny and execute the outstanding warrant. Ofc. Fielder was driving his patrol car and was in uniform.

Upon arrival, Ofc. Fielder found Denny parked by the pump in his red Chevrolet pick-up truck. Ofc. Fielder approached Denny's vehicle from the rear driver's side. Ofc. Fielder turned his body to fit between the truck and a partition next to the pump. He then approached Denny's driver side window, which was rolled down. Ofc. Fielder and Denny had the following exchange, as recorded on Ofc. Fielder's body camera:

DENNY: Hi.

OFC. FIELDER: How are you Mr. Denny? Got your I.D. on you?

DENNY: I'm going to leave.

OFC. FIELDER: No, you're not!

Denny then put his vehicle in drive, and pulled away from the pump at a high rate of speed. Ofc. Fielder had to quickly move between the bed of the truck

and the gas pump in order to avoid being struck as Denny pulled away.[2] There was approximately two feet of space between Ofc. Fielder and the pump.

Denny exited the gas station and turned left onto Buena Vista Road and then left onto Thunderstick Road. He then made an illegal left turn onto Winchester Road by jumping a median and driving through delineator posts after disregarding a stop sign on Thunderstick Road. According to Ofc. Fielder, Denny nearly struck another vehicle head-on when entering Buena Vista Road.

Benjamin Evans (Ofc. Evans), an off-duty officer, was in the same area—driving his patrol car while running errands—and responded to the call after hearing it on his radio. He approached the scene by turning left onto Elkhorn Road from Winchester Road about the time that Ofc. Fielder had approached Denny's vehicle. He saw Ofc. Fielder throw his hands up and jump back to avoid the truck, and then saw Denny take off at a high rate of speed. He activated his emergency lights and siren, turned left onto Buena Vista Road, and pursued Denny onto Thunderstick Road. There, he observed Denny run a stop sign and make an illegal left turn through delineator posts and over a median, and then continue into the busy Winchester Road traffic. Ofc. Evans ended his pursuit after his Sergeant radioed to tell him to abort the chase in the interest of public safety.

Meanwhile, traffic officer Brandon Pitcher (Ofc. Pitcher) was driving West on Winchester Road when he heard that Denny had fled from Ofc. Fielder and

[2] Ofc. Fielder stated at trial that he weighed nearly four hundred pounds with his equipment at the time of the incident.

that Denny was heading East on Winchester Road after jumping the median. Upon seeing the red pick-up truck in the east-bound lane, Ofc. Pitcher made a U-turn and pursued Denny through heavy traffic without his lights and siren on. When Denny took the interchange onto Interstate 75 from Winchester Road, Ofc. Pitcher ended his pursuit.

Based on the foregoing evidence, the jury convicted Denny of wanton endangerment in the first degree, fleeing or evading police in the first degree, and of being a persistent felony offender in the first degree.

Additional facts are discussed below as necessary.

II. ANALYSIS

Denny presents several arguments to this Court on appeal. To wit: (1) that the trial court erred when, after the close of voir dire and after several jurors had been excused, it refused to reopen voir dire to ask the remainder of the jury if they were certain they did not recognize Denny; (2) that the trial court erred by allowing the officers to state they were called to Thornton's because of an outstanding warrant; and (3) that the trial court erred by not granting his motion for a directed verdict on the charges of wanton endangerment in the first degree and fleeing or evading police in the first degree. We take each in turn.

A. The trial court did not improperly limit voir dire. Therefore, Denny's constitutional rights were not violated.

Denny asserts that the trial court abused its discretion by erroneously limiting the scope of voir dire, and, thereby, denied him the right to exercise preemptory strikes or challenges for cause in violation of both the United

States Constitution and the Kentucky Constitution.[3] For the reasons stated below, we find the scope of voir dire constitutionally adequate, and hold that the trial court did not abuse its discretion when denying defense counsel's request to reopen voir dire.

RCr 9.38 instructs trial courts to "afford parties a reasonable opportunity to conduct voir dire examination[.]"[4] A trial court has broad discretion in limiting the voir dire examination of prospective jurors in criminal cases.[5] Squarely within that discretion is the ability to prohibit a party from repeating questions already asked.[6] However, "that discretion is not boundless." [7]

"Appellate review of such limitation is for abuse of discretion." [8] Generally, an abuse of discretion occurs when "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by fair legal principles."[9] If a trial court has limited voir dire, "[t]he test for abuse of discretion…is whether an anticipated response to the precluded question would afford the basis for a peremptory challenge or a challenge for cause."[10]

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[3] This issue was properly preserved by the defense's contemporaneous objection to the trial court's denial of his request to reopen voir dire. Kentucky Rule of Criminal Procedure (RCr) 9.22.

[4] *Lawson v. Commonwealth*, 53 S.W.3d 534, 538 (Ky. 2001).

[5] *Rogers v. Commonwealth*, 315 S.W.3d 303, 306 (Ky. 2010).

[6] *St. Clair* v. *Commonwealth*, 140 S.W.3d 510, 534 (Ky. 2004) (citing *Woodall v. Commonwealth*, 63 S.W.3d 104, 118 (Ky. 2001)).

[7] *Hayes v. Commonwealth*, 175 S.W.3d 574, 583 (Ky. 2005) (citing *Webb v. Commonwealth*, 314 S.W.2d 543, 545 (Ky. 1958)).

[8] *Hayes*, 175 S.W.3d at 583.

[9] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

[10] *Hayes*, 175 S.W.3d at 583.

While conducting its voir dire, the trial court instructed defense counsel to introduce himself and his client to determine if any of the prospective jurors knew them. Defense counsel made the following introduction:

> Good morning, my name is Xon Hostetter, attorney for my friend Sherman Denny. This is the defendant today. This is my co-coun…well, my…he's helping us out today, that's for sure. Works in my office and will be an attorney soon. This is Jason Hernandez. I don't know if any of you recognize us or not. Our faces are quite unforgettable.

After this introduction, a potential juror raised her hand, approached the bench, and alerted the trial court that she knew the defendant from seeing him in a parking lot where he had asked her to buy his insulin. She stated that she refused to give him money, but offered to follow him to pay for the insulin instead. She was excused for cause.

Once the potential juror returned to her seat, the trial court resumed its voir dire and told the venire that if they had even a passing familiarity with the defendant, any witness, or counsel for either party then they ought to say so, stating:

> So, if anybody even looks familiar, or even thinks a name sounds a little bit familiar, this is the time where you go "you know, I think I know a Johnny Smith."…So, do any of those names sound familiar, or do any of these people look familiar?

No potential juror responded affirmatively. The trial court then concluded its voir dire.

After the conclusion of the Commonwealth's voir dire, Denny had ample time during his own voir dire to inquire further whether any of the jurors recognized or knew him. The record reflects that no such inquiry was made. It was only after the trial court dismissed for cause a number of jurors and closed voir dire that defense counsel expressed to the court that the defendant knew nine of the thirty-one potential jurors from "past things" and asked the trial court to reopen voir dire for further inquiry into this issue. Notably, defense counsel was not able to identify any of the nine potential jury members by juror number, and the record is absent of any indication that any of the nine potential jurors actually made it onto the petit jury.

In essence, Denny contends that both his counsel's statements and the trial court's questions were not sufficient, and that the trial court abused its discretion by refusing to reopen voir dire so he could double check that none of the potential jurors knew him, even though that question had already been asked by the trial court and answered by the venire. The trial judge expressed concern that she was not aware of any question that defense counsel could ask in this regard that had not already been answered. The record reflects that defense counsel did not advise the court of a different line of questioning that could be pursued. In his brief, Denny merely states that counsel or the court could have asked the jurors if they "were certain" that they did not recognize him. This is not a different question, and the same version was asked and answered at the proper time: during voir dire.

Having fully reviewed the record and briefs of both parties, the trial court clearly did not preclude or limit inquiry into whether any person on the venire recognized Denny. We are convinced that a refusal to reopen voir dire after the defendant had no restraint to ask such questions during his initial voir dire does not constitute a limitation of a defendant's right to examine the potential jury. The venire was asked if they knew him, and the one potential juror who indicated she did was excused from the panel. Denny had the opportunity to ask the venire for a third time, free from any prohibition or restriction by the trial court against doing so, if they were certain they did not know him during his voir dire. He did not take it. Therefore, we find that voir dire was not impermissibly limited, and cannot say that the trial court's refusal to reopen voir dire was an abuse of discretion. As a result, Denny's constitutional claims also fail.

B. The trial court did not abuse its discretion by admitting evidence of a prior bad act.

Denny next argues that the trial court erred by allowing testimony regarding an unrelated arrest warrant, which he asserts constituted either or all of the following: irrelevant evidence inadmissible under KRE[11] 401, inadmissible evidence that is more prejudicial than probative under KRE 403, or evidence of prior bad acts not otherwise admissible under KRE 404(b).

[11] Kentucky Rule of Evidence.

(1) Preservation

There is some dispute among the parties as to whether this issue was preserved for appellate review. Prior to trial, the Commonwealth filed a notice, pursuant to KRE 404(c), of its intent to introduce evidence of the unrelated warrant. The video record as well as the Commonwealth's written notice indicate that the Commonwealth intended to use the unrelated warrant to show Denny's motive in the case at bar. Denny did not file a written objection or motion in limine in response to this notice. The video record further indicates that defense counsel made a subsequent motion to exclude this at a hearing on October 18, 2019. During that hearing, defense counsel raised objections over both the notice requirement under KRE 404(c) *and* the evidentiary issue under KRE 404(b), stating "it's not a discovery issue, it's a 'we're going to bring in this extra thing at trial that would normally be excluded,' and we want to…after all, we're talking about 404(b) here. It's an exception to the admissibility rule." The trial court, responding, focused largely on whether notice was adequate, and ruled that the evidence was admissible over defense counsel's objection.

As this Court has repeatedly stated, "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."[12] In other words, objections raised and the grounds thereof must be fairly known

[12] *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

to the trial court to be preserved for appellate review.[13] In this case, and contrary to what the Commonwealth claims, Denny preserved his KRE 404(b) objection in the same can of worms as his 404(c) objection by raising both simultaneously at that October 18, 2019 hearing. That he has now abandoned the KRE 404(c) objection as grounds for reversal on appeal does not render his KRE 404(b) objection unpreserved. However, during the October 18, 2019 hearing defense counsel did not state that a violation of either KRE 401 or KRE 403 was the basis of his objection to admissibility of the unrelated warrant evidence. Because he did not claim it was inadmissible under KRE 401 or 403 then, he cannot claim it now. Therefore, this alleged error was properly preserved by the defense's pre-trial objection to the evidence being introduced as admissible under KRE 404(b), but was not properly preserved as to its admissibility under KRE 401 or 403.[14]

In his reply brief, Denny timely requested that this Court review the trial court's determination that the unrelated warrant evidence was admissible under the palpable error standard, articulated in RCr 10.26, should we hold that the objection was not preserved. As stated above, the objection on the basis of inadmissibility under KRE 401 and KRE 403 was not preserved.

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[13] *Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky. 1972) ("An objection made in the trial court will not be treated in the appellate court as raising any question for review which is not within the scope of the objection as made, both as to the matter objected to and as to the grounds of the objection, so that the question may be fairly held to have been brought to the attention of the trial court." (internal quotation marks and citations omitted)).

[14] RCr 9.22.

"Ordinarily, when an issue is unpreserved at the trial court, this Court will not review it unless a request for palpable error review under RCr 10.26 is made ***and briefed*** by the appellant."[15] Aside from his cursory request, Denny failed to brief how the trial court's ruling of admissibility under KRE 401 and KRE 403 would constitute palpable error. Accordingly, we decline to address this argument on appeal.

(2) The trial court's admission of the evidence under KRE 404(b) was not an abuse of discretion.

We review a trial court's ruling on the admission of evidence under KRE 404(b) for abuse of discretion.[16] A trial court abuses its discretion when it rules in a way that is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[17]

Denny contends that admission of the unrelated warrant evidence was an abuse of discretion on the basis that it violates KRE 404(b)'s prohibition against the admission of a defendant's prior bad act to prove conformity therewith. We disagree.

KRE 404(b) states in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan,

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[15] *Webster v. Commonwealth*, 438 S.W.3d 321, 325 (Ky. 2014) (citing *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008)) (emphasis added).

[16] *Holt v. Commonwealth*, 250 S.W.3d 647, 652 (Ky. 2008).

[17] *English*, 993 S.W.2d at 945.

> knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

A trial court should employ a three-pronged test in order to determine if evidence is admissible under KRE 404(b):

> (1) Is the other bad act evidence relevant for some purpose other than to prove the criminal disposition of the accused?
>
> (2) Is evidence of the other bad act sufficiently probative of its commission by the accused to warrant its introduction into evidence?
>
> (3) Does the potential for prejudice from the use of other bad act evidence substantially outweigh its probative value?[18]

This is an exclusionary rule.[19] Exceptions to this rule must be strictly construed.[20]

Under the first prong of the test, the Commonwealth argues that the unrelated arrest warrant, i.e., the other bad act, was relevant for a purpose other than to prove Denny's criminal disposition. And, the Commonwealth argues that the unrelated arrest warrant was inextricably intertwined with the other evidence in the case. Namely, that it proved his inextricably intertwined motive for fleeing. We agree.

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[18] *Howard v. Commonwealth*, 595 S.W.3d 462, 475 – 476 (Ky. 2020).

[19] *Id.* at 475.

[20] *Id.* (citing *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994) (quoting *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992)).

It is clear that the unrelated warrant was relevant to the circumstances surrounding the entire encounter at the gas station, as testified to by Ofc. Fielder. It was the sole purpose for Ofc. Fielder's presence at the gas station, and the basis upon which Ofc. Fielder ordered Denny not to leave. Without it, a reasonable jury would have questioned why Ofc. Fielder was interacting with Denny at all. To put it plainly, "KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation, including a picture of the circumstances surrounding how the crime was discovered."[21] By introducing evidence related to the existence of the warrant for the purpose of explaining the context for the encounter and Denny's motive for fleeing, the Commonwealth was doing just that. Therefore, testimony regarding the unrelated warrant was relevant.

Under the second prong of the test, we must determine if the unrelated arrest warrant was probative of its commission to warrant admission. Denny argues that the unrelated warrant was "not germane to the sequence of events surrounding the offenses of the instant case" and "not required to present the Commonwealth's case." Conversely, the Commonwealth asserts that the evidence is probative because the initial encounter would not make sense to a jury without mention of the warrant. The jury might think that the entire interaction, especially the actions that led to the charges they were considering,

[21] *Kerr v. Commonwealth*, 400 S.W.3d 250, 261 (Ky. 2013) (citing *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003), and *Clark v. Commonwealth*, 267 S.W.3d 668, 681 (Ky. 2008) (internal quotations omitted)).

would be unlawful or improper police conduct. Because the unrelated warrant set the stage for the encounter that led to the charges in the case at bar, we find the Commonwealth's argument persuasive. The testimony regarding the unrelated warrant was probative of its commission to warrant admission.

Under the third prong of the test, we must determine if the prejudicial effect of admission substantially outweighs its probative value. The Commonwealth argues that *not* admitting the evidence would have prejudiced its case, and that any prejudicial effect to Denny was de minimis, asserting that, without the unrelated warrants, Ofc. Fielder would have had no reason to disturb Denny. Thus, testimonial evidence regarding the unrelated warrant has a high probative value because it provided necessary context to the sequence of events that led to the charges filed. Denny asserts that admitting testimony regarding these unrelated warrants indicated to the jury that Denny had committed crimes in the past, and was, perhaps, trying to evade the law. We find Denny's argument uncompelling.

The trial court's determination of admission restricted any mention of the unrelated warrant only to its existence; the jury was not to be told the basis of the warrant. The trial court itself admonished the jury during voir dire that the unrelated warrant was not to be considered for any purpose other than the fact that it existed, and called the unrelated warrant "x." The trial court asked the venire: "Will you still make the Commonwealth prove these charges without considering 'x'?" No potential juror answered in the negative. Further, even assuming Denny is correct in his argument that the jury would use the

evidence as a basis to believe that he was evading the law, that goes directly to his motive, and is clearly excepted from 404(b)'s prohibition. Any potential prejudice was addressed by the trial court, and, as discussed above, testimony regarding the unrelated warrant did have a high probative value because it provided necessary context to the sequence of events that led to the charges filed.

We find no abuse of discretion in admission of this evidence.

C. The trial court did not err by denying Denny's motion for directed verdict on either charge.

Denny argues he was entitled to a directed verdict on the charges of fleeing or evading in the first degree and wanton endangerment in the first degree because the Commonwealth failed to prove every element of the offenses beyond a reasonable doubt. [22]

Each of these crimes implicate similar elements. We discussed this interplay in *Culver v. Commonwealth*, stating:

> [f]or first-degree wanton endangerment, the Commonwealth was charged with proving [the defendant] under circumstances manifesting extreme indifference to the value of human life…wantonly engaged in conduct which created a substantial danger of death or serious physical injury to another person.
>
> For first-degree fleeing or evading police, the Commonwealth's burden was to prove that while operating a motor vehicle with intent to elude or flee, [the defendant] knowingly or wantonly disobeyed a direction to stop his…motor vehicle, given by a person

[22] This issue was properly preserved. *See, e.g.*, *Commonwealth v. Jones*, 283 S.W.3d 665, 669 (Ky. 2009).

> recognized to be a police officer, and…by fleeing or eluding, he caused, or created substantial risk, of serious physical injury or death to a person or property.
>
> With respect to the results and circumstances described by these criminal offenses, a person acts wantonly when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. As to the risk, it must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.
>
> Serious physical injury is 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.[23]

The crux of Denny's argument on appeal of this issue has three parts: (1) there was insufficient proof to establish that he knowingly or wantonly disobeyed, or was even given, a direction to stop his vehicle by a person who he recognized as a police officer; (2) there was insufficient proof to establish that his actions created a substantial risk to of serious physical injury to another under KRS 520.095(1)(a)(4); and (3) that there was insufficient proof to establish that pulling away from the pump in the manner he did created a substantial risk of serious physical injury to Ofc. Fielder under KRS 508.060. Because both charges share the substantial risk component, we take these claims together.

[23] 590 S.W.3d 810, 813 (Ky. 2019) (internal citations and quotation marks omitted).

Due in part to Ofc. Fielder's body camera footage, there can be little dispute as to what happened during the initial interaction at the gas pump. When Ofc. Fielder approached Denny after exiting his patrol car and while wearing his police uniform, he called him by name, and asked for identification. Denny then said, "I'm leaving," to which Ofc. Fielder responded, "No, you're not." Denny left anyway.

Ofc. Evans, who was off duty but in his patrol car, then gave chase after activating his lights and sirens. After some time, a sergeant with the Lexington Police Department radioed to tell Ofc. Evans to end the pursuit, deeming it too grave a danger to public safety to continue. A third officer, Ofc. Pitcher, testified that he assumed the chase without lights or sirens. The Commonwealth argues that the officers' testimony regarding these moments was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant knowingly or wantonly disobeyed an order by police to stop. Denny argues this proof is insufficient to establish that he was given an order to stop by someone he recognized as police officers, and he was therefore entitled to a directed verdict.

The parties differ on whether Denny's actions amounted to a substantial risk of serious injury or death to another person. For the incident at the gas pump, body camera footage and witness testimony again fill that gap.

Denny contends he did not create a substantial risk of serious physical injury or death for Ofc. Fielder when he pulled away from the pump. While the body camera footage was unclear as to the spatial relationship between the

Ofc. Fielder and the pump or Ofc. Fielder and Denny's truck, the testimony offered by Ofc. Fielder at trial disposed of that uncertainty. He stated that, because of his size, he had to orient his body in such a way to avoid the pump, Denny's truck, and the pavement. According to his own testimony, Ofc. Fielder had little time to react as the back end of the truck quickly swung toward him when Denny pulled away at a high rate of speed. Both Ofc. Fielder and Ofc. Evans were adamant in their testimony that Denny made a quick exit from the pump.

As for whether Denny created a substantial risk of serious physical injury or death once he left the gas station, Denny asserts that he was not going at a high rate of speed, but concedes that he made several illegal traffic maneuvers. According to the testimony of Ofc. Evans, Denny was traveling at a high enough rate of speed that he could not catch up to him. The officers' testimony, on the whole, reflects that those illegal traffic maneuvers included: nearly striking a vehicle while leaving the gas station, running a stop sign before darting across five lanes of busy traffic on Winchester Road, driving into a lane designated for oncoming traffic, and making an illegal left turn through delineator posts while jumping a median. All these maneuvers occurred near busy shopping centers during busy weekday traffic.

We begin our analysis of this issue with our well-established standard of review:

> 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.
>
> [T]here 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.[24]

We apply an abuse of discretion standard when reviewing an appeal of a trial court's denial of a directed verdict. Unless a trial court's determination was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles," we must affirm. [25]

We hold that, based on the evidence submitted to the jury, it would not have been clearly unreasonable for it to find that Denny "knowingly or wantonly disobey[ed] a direction to stop his…motor vehicle, given by a person recognized to be a police officer" and "cause[d], or create[d] substantial risk, of serious physical injury or death to any person" in fleeing and evading police.[26]

The jury could reasonably believe that Ofc. Fielder and Ofc. Evans were recognized to be police from the evidence provided. Ofc. Fielder was wearing a

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[24] *Commonwealth v. Benham*, 816 S.W.2d 186, 187–88 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

[25] *English*, 993 S.W.2d at 945.

[26] KRS 520.095(l)(a)4.

police uniform and driving a police patrol car when he approached Denny at the pump. Ofc. Evans was driving his patrol car, and testified that he activated his lights and siren once he began pursuit. It is apparent that Ofc. Pitcher could reasonably be recognized as a police officer. He testified that Denny resumed his erratic driving behavior once he got behind him.

It was also reasonable for the jury to believe that Denny received a command to stop his vehicle. When Denny told Ofc. Fielder "I'm leaving," his reply was "No, you're not." This was a clear command to stop. By activating his emergency lights and siren, Ofc. Evans gave Denny a second command to stop.

Whether a substantial risk of serious physical injury occurred "turns on the unique circumstances of an individual case."[27] Because of the uniqueness of each case concerning this issue, our analysis into whether a substantial risk of serious physical injury or death was created "generally requires consideration of the manner in which a vehicle is operated and the conditions under which that vehicle is operated."[28] For example, speeding paired with

> disobeying stop signs and red lights; inclement weather; and circumstances in which other vehicles and pedestrians are at risk of serious physical injury indicated by the need to get out of the defendant's way, or likely to be put at such risk, such as in congested areas with schools and shopping centers [. . .] [could create] a substantial risk of serious physical injury.[29]

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[27] *Cooper v. Commonwealth*, 569 S.W.2d 668, 671 (Ky. 1978).

[28] *Culver*, 590 S.W.3d at 817.

[29] *Id.* (referencing *Brown v. Commonwealth*, 297 S.W.3d 557 (Ky. 2009); *Lawson v. Commonwealth*, 85 S.W.3d 571 (Ky. 2002), *overruled on other grounds by Hall v. Commonwealth*, 551 S.W.3d 7 (Ky. 2018); and *McCleery v. Commonwealth*, 410 S.W.3d 597 (Ky. 2013)).

Thus, the inquiry centers on whether there exists "a risk that is ample, considerable in . . . degree . . . or extent, and true or real; not imaginary"[30] of serious physical injury as determined under the singular facts of each case.

Under the facts of this case, the testimony of Ofc. Fielder as to his size and the approximate distance between his body and the pump as well as the rate of speed at which Denny took off, and Ofc. Evans' testimony from his point of view show it was not clearly unreasonable for the jury to find that the substantial risk element under KRS 508.060 was satisfied.

Likewise, there was sufficient evidence to allow the jury to determine whether a substantial risk of harm to any other person was created once Denny left the gas station. Ofc. Evans testified that Denny was traveling at a high enough rate of speed that he could not catch up to him. The officers' testimony, on the whole, reflects that Denny nearly struck a vehicle while leaving the gas station, ran a stop sign after darting across five lanes of traffic, drove into a lane designated for oncoming traffic, and made an illegal left turn through delineator posts. All of which occurred near shopping centers and on the congested Winchester Road corridor in Fayette County on a Monday morning. This proof was sufficient for a jury to determine Denny posed a serious risk of physical injury or death to other motorists.

[30] *Bell v. Commonwealth*, 122 S.W.3d 490, 497 (Ky. 2003) (citing *Cooper*, 569 S.W.2d at 671).

In sum, there was sufficient proof to establish that Denny knowingly or wantonly disobeyed a direction to stop his vehicle by a person who he recognized as a police officer, and that his actions created a substantial risk of serious physical injury under KRS 520.095(1)(a)(4). For the same reason, there was sufficient proof for a jury to find that Denny's actions created a substantial risk of serious physical injury under KRS 508.060. The trial court did not err in denying Denny's motion for a directed verdict for the first-degree fleeing and evading charge or for the first-degree wanton endangerment charge.

III. CONCLUSION

Based on the foregoing, we affirm.

All sitting. All concur.

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