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RENDERED: SEPTEMBER 28, 2023
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2022-SC-0351-MR

DARIUS JAMAL ALLEN — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
NO. 20-CR-00287

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Darius Allen appeals as a matter of right[1] from a Laurel Circuit Court judgment sentencing him to 20-years' imprisonment for wanton endangerment first degree and various other offenses. On appeal, Allen raises four claims of error, none of which merit reversal. We therefore affirm the judgment of the Laurel Circuit Court in all respects.

I. Facts and Procedural Background

The facts underlying Allen's case are straightforward. On the afternoon of July 21, 2020, Allen was traveling southbound on Interstate 75. Kentucky State Trooper Briston Smith was monitoring traffic on the interstate when Allen

[1] KY. CONST. § 110(2)(b).

passed Trooper Smith, traveling "slower than the normal flow of traffic." Trooper Smith elected to pull onto the roadway and follow Allen, although Trooper Smith did not at this time activate his lights. Allen had by then increased his speed and was passing cars at a high rate of speed. Trooper Smith was unable to close the gap with Allen for roughly ten miles, at which time he activated his lights. Allen initially moved toward the shoulder of the road, but as Trooper Smith followed Allen to the shoulder, Allen accelerated and fled.

Trooper Smith pursued Allen, driving his "pursuit-package" cruiser near its top speed of 131 mph but still failing to catch up with Allen. Allen drove through construction barrels, onto the shoulder, back into the roadway, weaving in and out of traffic at a dangerously high rate of speed. Eventually, troopers were able to successfully deploy spike strips to deflate Allen's tires. Allen attempted to drive on the deflated tires, but ultimately gave up and abandoned the vehicle to flee on foot across the interstate. Troopers were able at this point to apprehend Allen before anyone was seriously injured. The chase lasted roughly twenty minutes and covered approximately thirty-eight miles of roadway spanning three counties.

Allen explained that he fled because of a fear of law enforcement, as well as the presence of methamphetamine in the vehicle. A search of Allen's vehicle uncovered the alluded to methamphetamine. Allen was charged with wanton endangerment first degree as to Trooper Smith, first-degree fleeing or evading

police, first-degree trafficking in a controlled substance, and first-degree persistent felony offender.

After a one-day trial, Allen was convicted on all counts save trafficking, on which Allen was convicted of the lesser offense of first-degree possession of a controlled substance. The jury recommended Allen be sentenced to 20-years' imprisonment. The trial court adopted the jury's recommendation.

Allen now alleges serious errors occurred before and during his trial that entitle him to new proceedings before the trial court. Those errors are discussed in further detail below.

II. Analysis

a. Brought out in chains

Allen's first point of error concerns a curious occurrence that occurred immediately prior to the start of voir dire in his trial. According to Allen, after the courtroom doors were opened and some jurors had entered, a bailiff opened the door to the courtroom holdover and loudly asked if defense counsel wanted Allen brought out, to which counsel agreed. When the bailiff closed the holdover door, Allen asserts a "clanking" could be heard in the courtroom. Finally, when Allen was brought into the courtroom, he was escorted by a bailiff to the defense table. Allen moved for a mistrial based on those events and their capacity to cause jurors to believe Allen was in custody, thereby tainting the presumption of innocence.

Allen believes this event should be evaluated under the standard we recently set forth in *Deal v. Commonwealth*, 607 S.W.3d 652 (Ky. 2020). In

Deal, the jury was shown a thirty-five minute recording of Deal being interviewed by police while Deal was handcuffed and wearing an orange state-issued jumpsuit. *Id.* at 656. Deal's counsel objected to showing the video recording, but the objection was overruled. *Id.*

On appeal to this Court, we articulated a standard for issues involving a "trial event. . . [that] undermines the jury's ability to decide the case fairly." *Id.* at 663. First, the trial court must consider whether the practice is "inherently prejudicial" by considering several factors such as

> the likelihood that the challenged event could be interpreted by the jury as indicating that the defendant has already been adjudged to be particularly dangerous or culpable; the reasoning behind other courts' decisions when faced with similar cases; and the likelihood that the event would normally operate to the disadvantage only to those defendants who are unable to post bond to be released pending trial.

Id. at 663-64 (footnotes omitted). If the event is determined to have been "inherently prejudicial," the trial court must then determine if the event is justified by an essential state interest by considering factors such as "(1) the merits of the asserted state interest; (2) the potential threat posed by the challenged event to the defendant's constitutional rights; and (3) the availability of alternatives that could minimize the risk posed to the defendant's rights while still acting to serve the asserted state interest." *Id.* at 664 (footnotes omitted).

> [I]n cases where an "inherently prejudicial" trial event that does not serve an essential state interest is implemented, prejudice is presumed on appellate review of the trial court's decision, and the defendant is entitled to reversal of his conviction unless the defendant did not challenge the event before the trial court, or

> unless the state can affirmatively show beyond a reasonable doubt that the event did not prejudice the defendant.

Id. at 665 (footnotes omitted).

However, since *Deal* was rendered, we have clarified that its standard does not apply to any and all occurrences that could prove inherently prejudicial. In *Saxton v. Commonwealth*, 671 S.W.3d 1, 15 (Ky. 2022), we explained, "*Deal* addressed the issue of a video being shown of the defendant in custody and wearing jail attire, an inherently prejudicial circumstance. And all the cases it relied upon for this holding dealt with routine, repetitive, customary, and prolonged practices as opposed to single incidents beyond the direction of the trial court." (Citations omitted). We held that the occurrence in *Saxton*, the momentary holding-up of defendant and his counsel as they traveled to their table in the courtroom prior to voir dire, was "more analogous to an outburst and ought to be addressed under the well-established standards regarding outbursts." *Id*. Accordingly, we assessed the occurrence under the mistrial standard rather than the two-part test in *Deal*. *Id*. at 15-16

Upon review of what occurred prior to voir dire in Allen's case, we believe it matches more closely the circumstance in *Saxton* than *Deal*. Taking Allen's assessment of events as accurate, what happened was not "routine, repetitive, customary, and prolonged," but was rather an isolated incident that took place beyond the direction of the trial court. Further, we are not convinced that the occurrence here implicated "badges of custody" that could act to bring the issue under *Deal*. *See Lewis v. Commonwealth*, 642 S.W.3d 640, 646 n.30 (Ky.

2022) (noting that had the challenged photos of defendant borne "badges of custody" the *Deal* test would be applicable). The closest Allen comes to describing "badges of custody" are the purported yelling of the bailiff and the clanking sound which may have suggested custody in some way, neither of which presents a clear indication to the jurors that Allen was in custody, nor is it clear that the jurors would even have perceived the sounds complained of.[2] Otherwise, Allen was brought out in street clothes—khaki pants, white button-down shirt, and tie— from an unlabeled door off the courtroom in the mere presence of a bailiff.[3] *See Holbrook v. Flynn*, 475 U.S. 560, 570-71 (1986) (presence of uniformed officers in front row of gallery behind defendant during trial not inherently prejudicial as they were not likely taken "as a sign of anything other than a normal official concern for the safety and order of the proceedings[]"). In sum, what occurred prior to voir dire in Allen's case was not the kind of occurrence to which *Deal* was aimed and applying its analysis would be inapposite here.

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[2] Although the incident was not captured on the video recording, the video does provide us with an understanding of the layout of the courtroom. Given the holdover door's close proximity to the defense table, that defense counsel would hear things that would otherwise not be perceivable to others in the courtroom, such as "clanking" emanating from the holdover, is entirely conceivable.

[3] Even were we inclined to apply *Deal* here, there would be no reversible error on this issue. Upon being informed of the potentially prejudicial occurrence, the trial judge undertook an investigation which included interviewing both bailiffs involved in bringing Allen from the holdover and well as physically inspecting the holdover and its position in relation to the courtroom and the prospective jurors. Although the trial judge did not explicitly make his ruling with reference to the *Deal* factors, he nevertheless performed a sufficient analysis as to the first element to determine the occurrence was not inherently prejudicial to Allen. As suggested by our discussion of the proper standard of review, the trial judge committed no abuse of discretion in making this determination.

Accordingly, we will analyze the occurrence under our well-worn standard of review for denial of a mistrial. "The standard for reviewing the denial of a mistrial is abuse of discretion. A mistrial is appropriate only where the record reveals a manifest necessity for such an action or an urgent or real necessity." *Knuckles v. Commonwealth*, 315 S.W.3d 319, 322 (Ky. 2010) (quoting *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002)).

As pointed out by the Commonwealth, Allen did not request an admonishment to the venire after the trial court denied his motion for a mistrial. The situation created by the bailiff speaking to defense counsel and by any "clanking," to the extent that prospective jurors were even aware these things occurred, could in all likelihood have been cured by an appropriate admonition. *See Carter v. Commonwealth*, 278 Ky. 14, 128 S.W.2d 214, 217-18 (1939) (no mistrial required where sheriff and deputy sat behind defendant sneering and laughing as defendant testified), *cited with approval in Saxton*, 671 S.W.3d at 16. Allen also did not attempt to establish prejudice by questioning the jurors about the sounds during voir dire. *See Saxton*, 671 S.W.3d at 16 (no prejudice shown where defendant failed to query venire as to prejudicial effect of investigator blocking his path). "[W]here an admonishment is sufficient to cure an error and the defendant fails to ask for the admonishment, we will not review the error." *Lanham v. Commonwealth*, 171 S.W.3d 14, 28 (Ky. 2005) (citing *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky. 2000)). Because Allen failed to request an admonition from the trial court and further failed to question the venire as to whether the sounds from the

holdover prejudiced them against him, we hold there was no abuse of discretion in denying his motion for a mistrial.

b. Juror Strikes

Allen next argues that the trial court erred in failing to strike for cause two jurors he argues were unfit to serve on the jury. Both Allen and the Commonwealth agree there is no issue regarding preservation as to either juror, and our review of the record reveals no preservation issue, so we move on to the question of whether one, both, or neither of the jurors should have been dismissed by the trial judge.

We review the failure to strike a juror for cause for abuse of discretion. *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 192 (Ky. 2017). Whether the trial judge has abused his discretion turns on whether the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

RCr[4] 9.36 states that a juror is to be struck "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence[.]" A fair and impartial juror is one who can conform his views to the requirements of the law and render a verdict solely on the evidence at trial. *Hubers v. Commonwealth*, 617 S.W.3d 750, 762 (Ky. 2020). "The trial court should err on the side of caution by striking the doubtful juror; that is, if a juror falls within a gray area, he should be stricken." *Ordway v.*

[4] Rule of Criminal Procedure.

Commonwealth, 391 S.W.3d 762, 780 (Ky. 2013). With these principals in mind, we address each juror individually.

Juror 111: Juror 111 spoke up in response to the trial judge's question to the venire about whether any of them knew or recognized any of the potential witnesses. Juror 111 responded that he "knew [Sheriff] John Root":

> **Juror 111**: I've pretty much known him about all my life, so. . . . I've run into him at football games and stuff like that.
> **Judge**: Just been acquainted with him most of your life?
> **Juror 111**: Well, we went through school all together and everything. Yeah, pretty much. Afterwards, just acquaintances.
> **Judge**: The fact that you are acquainted with him, would that have any bearing on your ability to serve in this case?
> **Juror 111**: No.
> **Judge**: If he were to testify, would you tend to give his testimony any more or less weight or credibility than any other witness who may testify?
> **Juror 111**: No.
> **Judge**: Alright, thank you sir.

Following the Judge's discussion with Juror 111, defense counsel asked for Juror 111 to be called to the bench for additional questions.

> **Defense**: Were you close acquaintances with John Root [at the] end of school?
> **Juror 111**: Well, we went through school together with my wife. We talk back and forth sometimes on Facebook.
> **Defense**: You and John do?
> **Juror 111**: Well, I don't, my wife does. If she's got questions or something, she'll talk to John, ask questions and stuff like that. Then, if we're out, if we see him, we stand around and talk and all that. But as far as just running around together and all that, no, we don't do anything like that.
> **Defense**: Would you consider yourself friends with John?
> **Juror 111**: Yes.
> **Defense**: And if you were out in public and you saw him and you were on the jury, and the jury found against what the Commonwealth was trying to present, would you feel a little uneasy around him, especially if he was a part of the case?
> **Juror 111**: No, I wouldn't to be honest, I wouldn't.

The Commonwealth had no questions for the juror. Allen moved to strike Juror 111, but the trial court declined to do so based upon the absence of any special relationship between the Juror and Sheriff Root and based upon the juror's responses to the questions of the court and of defense counsel. Allen now argues that regardless of Juror 111's answers, his relationship with Sheriff Root sufficiently tainted his perspective and made him unfit to sit in judgment of Allen.

We must first ask whether Juror 111's relationship to Sheriff Root was in itself disqualifying. As stated by the juror, after they left school, he was not in regular contact with Root, although his wife would occasionally reach out to Root for advice. They would make small talk if they saw each other socially but would not otherwise make an effort to be around one another. From the description provided by Juror 111, the relationship between himself and Sheriff Root is not unlike that of many schoolyard friends who drifted apart after graduating. We have not held the mere fact of knowing a potential witness to be disqualifying, *Hammond v. Commonwealth*, 504 S.W.3d 44, 55 (Ky. 2016), nor is the fact the Juror 111's wife is in more consistent contact with Sheriff Root sufficient for dismissal, *cf. Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002) (juror's child's friendship with officer involved in case not disqualifying).

Nor were any of Juror 111's answers during voir dire indicative of his inability to serve as a juror in Allen's case. He clearly and consistently responded that his relationship to Root would have no bearing on his ability to fairly and impartially hear the case. His answers were unequivocal and given

without hesitation. While Allen is correct that a potential juror's prejudice cannot be made to disappear by the simple asking of a "magic question" to rehabilitate the juror, *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991), in this case, no rehabilitation was necessary as Juror 111 had done nothing to indicate his lack of fitness to serve. Accordingly, we hold there was no abuse of discretion in denying Allen's motion to strike for cause Juror 111.

Juror 140: Counsel for Allen queried the venire as to whether any of them had been impacted personally by drug addiction. Juror 140 signaled in the affirmative and all parties approached the bench. There, Juror 140 explained that his second cousin's daughter died of a heroin overdose, the daughter's brother is "messed up with meth," and an individual who is "technically not [his] sister-in-law" was raising her grandchild because the child's mother overdosed on heroin. In response, the trial court asked Juror 140 a series of questions:

> **Judge**: Is there anything about that that would have any bearing on your ability to serve in this case?
> **Juror 140**: I don't think so, to be honest. I can't say for sure, but I don't think so.
> **Judge**: I need you to tell me whether it would or not. You are the only one who would know the answer.
> **Juror 140**: I don't think so, no.
> **Judge**: So, I guess my question is. . . do [you] know of any reason why if selected as a juror in this case that you could not render a verdict based solely on the evidence presented at trial and the law as contained in the court's instructions? Which means—
> **Juror 140**: I don't think I would have a problem.
> **Judge**: Okay
> **Juror 140**: I think I can do it, yes.

Defense counsel then asked a follow-up question to clarify the drug problems within Juror 140's family, followed by the following exchange:

> **Defense**: So the fact that my client is accused of trafficking methamphetamine into this area, does that give you pause in terms of believing his testimony?
> **Juror 140**: No, I think I could handle it.
> [Clarifying who died of a heroin overdose]
> **Defense**: So, if it came out in the case that my client was in possession of heroin, would that change your position on believing his testimony or listening to the facts—
> **Juror 140**: No.
> **Defense**: —fully on both sides?
> **Juror 140**: No, no.

The Commonwealth had no questions for the juror. Allen moved to strike, acknowledging that Juror 140 provided satisfactory answers, but arguing that the drug use within his family made him nevertheless unable to permissibly sit on the jury. The trial court declined to strike, noting the distance of the family relations and Juror 140's responses.

This court has never held that drug use within a juror's family is *ipso facto* a basis for disqualifying a juror. *Hammond v. Commonwealth*, 504 S.W.3d 44, 56 (Ky. 2016) (no abuse of discretion in failing to strike for cause juror in drug-related case whose friends were addicts and whose mother died by suicide as the result of a pill addiction, but who clearly indicated he could be a fair juror in response to questioning); *Little v. Commonwealth*, 422 S.W.3d 238, 242-44 (Ky. 2013) (collecting cases on disqualification where a family member was a victim of a similar crime and specifically rejecting an approach that could automatically disqualify jurors whose families have been affected by drug use from sitting in drug-related cases as "paternalistic"). Thus, Juror 140's family history with drugs was not by itself sufficient to disqualify him

from serving on Allen's case. Rather, in order to be disqualified, there needed to be an indication of bias in Juror 140's responses.

Our review of Juror 140's interview at the bench reveals to us no responses that undermine the trial judge's determination that Juror 140 could be fair and impartial. He was able to answer with little to no hesitation when asked if his family history would affect his ability to serve. His answers were, for the most part, unequivocal responses. Even where Juror 140 indicated he "thinks" he would be unaffected, little indicates that this softened response is an equivocation; rather Juror 140's delivery and tone of voice suggests resigned acceptance of an all-too-common tragedy. His body language was consistent with the nature of his responses. In all, we can discern no additional indication of bias by Juror 140 that would mandate his removal from the venire. Because his family history did not by itself disqualify Juror 140 and because his answers showed that he was able to set aside his family tragedies and judge Allen fairly and impartially, we hold there was no abuse of discretion in refusing to strike Juror 140 for cause.

c. Lesser Instruction

Allen claims that the trial court erred in denying his request that the lesser offense of second-degree fleeing or evading be tendered to the jury for consideration. Allen contends that whether or not a substantial risk of serious physical injury or death resulted from the chase was a question of fact for the jury to determine and the refusal to instruct as to the lesser offense deprived Allen of his constitutional rights to due process and a fair trial. We disagree.

We review a trial court's decision to refuse to include a jury instruction for abuse of discretion. *Pozo-Illas v. Commonwealth*, 671 S.W.3d 118, 129 (Ky. 2023) (citing *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015), *overruled on other grounds by Univ. Med. Cntr., Inc. v. Shwab*, 628 S.W.3d 112 (Ky. 2021)). Accordingly, as noted before, this issue will only constitute reversible error if the judge's ruling "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (quoting *English*, 993 S.W.2d at 945).

Our analysis begins with,

> the well-settled principles that: (1) it is the duty of the trial judge to prepare and give instructions on the whole law of the case … [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony; and (2) Although a defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions, the trial court should instruct as to lesser-included offenses only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.

Lawson v. Commonwealth, 85 S.W.3d 571, 574 (Ky. 2002) (quotation marks omitted), *overruled on other grounds by Hall v. Commonwealth*, 551 S.W.3d 7 (Ky. 2018).

The difference between first- and second-degree fleeing or evading stems from the existence of at least one of four statutory conditions that must be present for an action to qualify as fleeing or evading in the first degree. The elements of first-degree fleeing or evading, as relevant to Allen's charged offense, reads as,

(1) A person is guilty of fleeing or evading police in the first degree:

> (a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:
>
> . . .
>
> 4. By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property[.]

KRS[5] 520.095(1). Second-degree fleeing or evading contains the same language as present in KRS 520.095(1)(a) but omits language relating to the four conditions. KRS 520.100(1)(b) ("A person is guilty of fleeing or evading police in the second degree when: . . . [w]hile operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a recognized direction to stop his vehicle, given by a person recognized to be a peace officer[]").

Much as in *Lawson*, because Allen did not actually cause serious physical injury or death to any person or serious injury to property, the question before this Court is "whether a jury could have had reasonable doubts as to whether the fleeing driver's conduct created a substantial risk of such results." 85 S.W.3d at 576. And, again as in *Lawson*, we have little trouble concluding that a jury could not have entertained reasonable doubt as to whether Allen's actions created a substantial risk of harm or death to law enforcement involved in the chase or to other drivers merely traveling the interstate on that day. Allen traveled at speeds in excess of 131 mph, travelling on the shoulder of the interstate, weaving in and out of traffic, and even driving

[5] Kentucky Revised Statutes.

through obstructions placed to cordon off construction zones. These actions continued for 20 minutes and endangered others along a 38-mile stretch of Interstate 75. At any point, one wrong move could have ended with the serious physical injury or death of any one of those drivers, not to mention the damage that would have been done to their vehicle. Indeed, Allen admits that his actions could have caused a crash and that people could have died. As the trial judge opined, "a thousand wonders someone wasn't hurt or killed in this pursuit." Accordingly, we hold there was no abuse of discretion in the trial court's refusal to instruct the jury as to the lesser-included offense of second-degree fleeing or evading police.

d. Directed Verdict on Wanton Endangerment

Lastly, Allen argues the trial court erred in not granting a directed verdict as to the first-degree wanton endangerment charge. Because this charge is related only to Trooper Smith, Allen asks us to take into consideration the volitional nature of Smith's pursuit and to craft a blanket rule preventing any defendant from being charged with wanton endangerment when the victim is a law enforcement officer placing themselves at risk to stop a defendant's conduct. This we refuse to do.

Although Allen's argument appears to concede that he did not meet the standard for a directed verdict on this charge, we address the matter briefly to dispel any doubts. A directed verdict is only to be granted where "the evidence, when construed in favor of the Commonwealth, could not induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty."

Quisenberry v. Commonwealth, 336 S.W.3d 19, 34-35 (Ky. 2011). "[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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187–88 (Ky. 1991). On appellate review, the standard is fundamentally the same: "whether, viewing the evidence in the light most favorable to the Commonwealth, any rational juror could have found all the elements of the crime." *Quisenberry*, 336 S.W.3d at 35.

As to first-degree wanton endangerment, the jury needed to determine the following to find Allen guilty: "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." KRS 508.060. An individual 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." KRS 501.020(3). For first-degree wanton endangerment, Allen's actions must exhibit "extreme indifference to human life, *i.e.*, 'aggravated wantonness.' 'To be convicted, the defendant must have both acted with the requisite mental state and created the danger prohibited by the statute.'" *Taylor v. Commonwealth*, 617 S.W.3d 321, 325 (Ky. 2020) (quoting *Brown v. Commonwealth*, 174 S.W.3d 421, 426 (Ky. 2005); *Hall v. Commonwealth*, 468 S.W.3d 814, 829 (Ky. 2015)).

To the extent Allen argues Trooper Smith's volitional act severed the chain of causation between Allen's conduct and the substantial danger that created for Smith, we addressed that issue in *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002), and *Taylor*. In *Robertson*, an officer was killed after falling through a gap between roadways while engaged in a foot pursuit of Shawnta Robertson. *Id.* at 834-35. Robertson was convicted of second-degree manslaughter for wantonly causing the officer's death. *Id.* at 834. On appeal, Robertson argued that his act of resisting arrest was not the legal cause of the death. *Id.* at 835. We held otherwise, applying Kentucky's statutory provisions for wantonness, KRS 501.020(3) and causation, KRS 501.060, we determined that while Robertson's act was "obviously" a "but for" cause of the officer's death, the question was primarily one of *mens rea*—in other words that question was properly whether the officer's act of attempting to cross the gap was "either foreseen or foreseeable by Appellant as a reasonably probable result of his own unlawful act of resisting arrest by fleeing from apprehension." *Id.* at 836 (citing Robert G. Lawson and William H. Fortune, *Kentucky Criminal Law* § 2–4(d)(3), at 74 (LEXIS 1998)). In making that determination, "the reasonableness of the officer's response is relevant in determining whether the response was foreseeable by the defendant. The more reasonable the response, the more likely that the defendant should have foreseen it." *Id.* at 837. Applying these principals, we found there was sufficient evidence to present the charge to the jury, noting that "[t]he conduct that supports Appellant's conviction is the continuation of his unlawful flight when he obviously knew

that Partin intended to pursue him . . . , and that, to do so, Partin would be required to cross the open space between the roadway and the walkway and thereby risk falling to his death." *Id.*

This Court reached a similar result in a different circumstance in *Taylor*. In that instance, Taylor was among a large group of people gathered in a fast-food establishment's parking lot after dark. Taylor, 617 S.W.3d at 323. In an attempt to disperse the crowd, Taylor fired multiple shots from a handgun into the air. *Id.* In response, multiple other individuals in the crowd fired shots at Taylor. *Id.* In the chaos, Trinity Gay was struck and killed by a bullet fired from an unknown weapon. *Id.* at 323-24. Taylor was convicted of wanton murder for Gay's death. Id. at 324.

On appeal, Taylor challenged the trial court's failure to grant a directed verdict as to the wanton murder charge, arguing the responsive gunfire was not a foreseeable result of his act. Id. at 324-25. After engaging in a statutory analysis similar to *Robertson*, we asked the same question, "Did the defendant know, or have reason to know, that the result (as it actually occurred) was rendered substantially more probable by his conduct?" *Id.* at 326. Again, we found that sufficient evidence existed that a reasonable jury could have answered the question in the affirmative. *Id.* at 327-28.

Both of these cases share fundamental similarities with Allen's case, with the fortunate difference that no one was killed as the result of Allen's act. We do not here rehash the learned analyses of those two opinions, rather we will apply their logic to the facts of Allen's case and ask the dispositive question:

was there evidence to show that Allen "[knew], or [had] reason to know, that the result (as it actually occurred) was rendered substantially more probable by his conduct?" *Id.* at 326. The answer to that question is "yes."

A reasonable jury could have concluded that when Allen committed to his initial feint of pulling over to the shoulder and then suddenly accelerating to high speed, he had reason to know that Trooper Smith would pursue him. Indeed, Trooper Smith's pursuit was not just a possible occurrence, but was in fact a probable one. When that pursuit led to Trooper Smith travelling at dangerous speeds through traffic and through construction on a major interstate, such an outcome was entirely foreseeable. To paraphrase from *Robertson*, the conduct that supports Allen's conviction is the continuation of his unlawful flight when he obviously knew that Smith intended to pursue him, and that, to do so, Smith would be required to drive at high speed in traffic and thereby risk substantial danger of death or serious physical injury to himself. The Commonwealth presented sufficient evidence to send the wanton endangerment charge to jury and the directed verdict was properly denied.

With respect to Allen's suggestion that we create a rule limiting wanton endangerment in instances of police pursuits, we can discern little to support such a wide-ranging and revolutionary alteration to the law. As the discussion above suggests, our jurisprudence recognizes a long-standing acceptance that dangerous conduct that inspires equally (or more) dangerous reactionary conduct from others can form the basis for a "wanton" charge against the initial actor. The fact that the dangerous reaction was the result of a law

enforcement officer choosing to pursue a suspect rather than allow him to escape is immaterial. If we accept that a wanton murder charge can be based upon the illegal reaction of others, as happened in *Taylor*, then there can be little doubt that a similar charge can stem from the legal, if perhaps inadvisable, reaction of an officer tasked with apprehending suspects of crime. As we said in *Robertson*, "It is immaterial that the ultimate victim was the officer, himself, as opposed to an innocent bystander." 82 S.W.2d at 837. We decline to alter our jurisprudence today.

Accordingly, we hold there was no error in the trial court's refusal to grant a directed verdict in favor of Allen on the first-degree wanton endangerment charge.

III. Conclusion

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

All sitting. All concur.

COUNSEL FOR APPELLANT:

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