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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2001-CA-002568-MR

LESLIE L. CARDONA — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS McDONALD, JUDGE
ACTION NO. 00-CR-002666

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: COMBS AND DYCHE, JUDGES; AND POTTER, SPECIAL JUDGE.[1]

POTTER, SPECIAL JUDGE: Leslie Cardona appeals from a jury verdict finding him guilty of second-degree manslaughter, second-degree wanton endangerment, and driving while intoxicated. Cardona contends that he was entitled to a directed verdict; that the trial court erred by denying the introduction of Kentucky Revised Statutes (KRS) 189.570, a statute concerned with the duties of a pedestrian; and that the

[1] Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

trial court erred when it denied his proposed instruction on "intervening causes." Having reviewed the arguments of the appellant and finding no error, we affirm.

On October 20, 2002, at approximately 9:20 p.m., Sefua Custic; Custic's 12-year old daughter, Elvidina; an adult friend, Suada Masic; and Masic's eight year old son were crossing a poorly lit highway in Louisville. The highway contained four driving lanes and an additional middle turning lane. The foursome crossed two lanes. Whereas Masic and her son waited in the turning lane, for reasons that are not clear, Custic's daughter continued to cross the remaining two lanes. Apparently seeing that her daughter was in danger, Custic ran into the two lanes and pushed her daughter onto the shoulder of the road. A car driven by Cardona struck and killed Custic.

At the time of the accident, Cardona was in route to his ex-wife's apartment, which was about an eight-minute drive from his own apartment. Cardona concedes that he consumed alcoholic beverages just prior to leaving his apartment, that he was concerned that he might be over the legal alcohol limit, and that he administered himself a personal portable breathalyzer prior to leaving his apartment. Cardona failed sobriety tests administered at the accident scene, and a Breathalyzer test administered approximately 2 hours and 20 minutes following the accident produced a blood-alcohol reading of .176.

On December 7, 2000, Cardona was indicted for murder (KRS 507.020); first-degree wanton endangerment (KRS 508.060); and operating a motor vehicle under the influence of intoxicants (KRS 189A.010(1)(4)(a)). Following a jury trial, Cardona was convicted of second-degree manslaughter, second-degree wanton endangerment, and driving under the influence. Consistent with the jury's recommendation, on November 5, 2001, the trial court sentenced Cardona to ten years on the manslaughter conviction, 12 months on the wanton endangerment conviction, and 30 days on the driving while intoxicated conviction. This appeal followed.

First, Cardona contends that he was entitled to a directed verdict on the murder charge, and any lesser-included offenses, on the basis that there was not sufficient evidence to show that his intoxication was the cause of the traffic accident and, therefore, the victim's death.

In reviewing a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). 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. Id. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserve for the jury questions as to the

credibility and weight to be given to such testimony. Id. 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 is the defendant entitled to a directed verdict of acquittal. Id.

KRS 507.040, the statute which defines the offense of second-degree manslaughter, provides, in relevant part, as follows:

> (1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's:
>
> (a) Operation of a motor vehicle;

501.020(3) defines “wantonly” as follows:

> (3) "Wantonly"-- A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk 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. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

KRS 507.040(1) has been interpreted to imply that driving under the influence of intoxicants will almost always be

wanton conduct. See Keller v. Commonwealth, Ky. App., 719 S.W.2d 5, 7 (1986). "[D]riving under the influence [is] sufficient to prove the element of wanton conduct required in KRS 507.020(1)(b) [wanton murder]." Commonwealth v. Runion, Ky. App., 873 S.W.2d 583, 586 (1993) (*citing* Walden v. Commonwealth, Ky., 805 S.W.2d 102, 104 (1991) and Hamilton v. Commonwealth, Ky., 560 S.W.2d 539, 541 (1978)).

Viewing the evidence in the light most favorable to the Commonwealth, there was ample evidence from which the jury could have found that Cardona was driving while intoxicated. Cardona admitted that he had drunk alcoholic beverages only minutes prior to the accident, an experienced police officer administered field sobriety tests at the scene and concluded that Cardona had failed the tests, and a Breathalyzer test administered approximately two hours and twenty minutes following the accident produced a blood-alcohol reading of .176.

Further, there was adequate evidence for the jury to conclude that Cardona's intoxication, and the corresponding diminishment of his driving capabilities, was the cause of the accident and, consequently, Custic's death. Cardona testified that when the accident occurred, he did not even realize that he had hit Custic and narrowly missed Custic's daughter. This is circumstantial evidence that Cardona was so impaired that he

could not distinguish events occurring immediately in front of his vehicle and within the illumination of his headlights.

Even though a defendant does not intend to kill, if he was aware of and consciously disregards a substantial and unjustifiable risk that his conduct may result in the death of another person, he is guilty of second-degree manslaughter. Elliott v. Commonwealth, Ky., 976 S.W.2d 416, 419 (1998). There was ample evidence from which the jury could have found that Cardona consciously disregarded the substantial and unjustifiable risks associated with driving under the influence of alcohol, failed to see the pedestrians and react in a timely manner as an unimpaired driver would have, and that his wanton conduct of driving while intoxicated was the antecedent cause of Custic's death. Cardona was not entitled to a directed verdict.

Next, Cardona contends that the trial court erred when it refused to permit the introduction of KRS 189.570(9). At trial Cardona sought to introduce several statutes which enumerate the duties placed upon pedestrians crossing and/or walking adjacent to highways. The trial judge allowed in several such statutes but ruled KRS 189.570(9) to be inapplicable and excluded it. KRS 189.570(9) provides as follows:

> (9) No pedestrian shall suddenly leave a curb or other place of safety and walk or

> run into the path of a vehicle which is so close as to constitute an immediate hazard.

Kentucky Rules of Evidence (KRE) 402 sets out the general rule that all relevant evidence is admissible and evidence which is not relevant is inadmissible. KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 403 provides the following exception to KRE 402:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

A trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id. (citations omitted).

KRS 189.570(9) is of questionable relevance in this case. The statutory language defining wanton murder and the

lesser-included offenses is concerned with the conduct of the defendant and whether his conduct caused the death of the victim. KRS 187.570(9) imposes the common-sense duty on a pedestrian not to walk into the path of an oncoming vehicle. However, under the circumstances of this case, if the jury were inclined to believe Cardona's theory that Sefua and Elvidina Custic were the cause of the accident on the basis that they darted in front of his vehicle, the existence of the statute adds little to assist the jury. Further, at most a violation of KRS 189.570(9) would demonstrate per se negligence on the part of Custic and her daughter, and negligence on the part of the victim does not absolve the defendant of his own criminal conduct. See Robertson v. Commonwealth, Ky., 82 S.W.3d 832, 838 (2002).

We are persuaded that the trial court did not abuse its discretion by excluding evidence of the statute. At minimum, given the marginal significance of the statute, the relevancy of KRS 187.570(9) was substantially outweighed by the danger of confusing or misleading the jury.

Next, Cardona contends that the trial court erred by failing to give an instruction on "intervening causes."

The court's duty in a criminal prosecution is to instruct the jury on the whole law of the case. Lawson v. Commonwealth, 309 Ky. 458, 218 S.W.2d 41 (1949). The jury is to

be instructed on every state of the case deducible from and supported by the evidence presented. Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988). The instructions, however, must follow the evidence actually presented and no theory of the case unsupported by the evidence is entitled to an instruction. Barbour v. Commonwealth, Ky., 824 S.W.2d 861, 863 (1992).

The trial judge gave the jury the basic instructions on wanton murder, manslaughter in the second degree, and reckless homicide, accompanied by the definitions of "wantonly" and "recklessly," as set forth at 1 Cooper, Kentucky Instructions to Juries (Criminal) §§ 3.27, 3.28, and 3.29 (4th ed. Anderson 1993). Since Cardona's October 2001 trial, the Supreme Court, in Robertson v. Commonwealth, Ky., 82 S.W.3d 832 (2002) has issued a model jury instruction for second-degree manslaughter which incorporates the causation elements of KRS 501.060. Id. at 838. The Opinion discusses that the Palmore instruction relies upon the definition of "wantonly" to embody the "risk" element of KRS 501.060(3), but fails to embody the "substantially more probable" elements of KRS 501.060(3)(b).[2]

The Supreme Court has thus adopted a second-degree manslaughter instruction incorporating what it has determined to be the appropriate causation elements. As it turns out, the Robertson instruction would have been less favorable to Cardona

[2] See pgs. 11 – 12, infra, for the relevant portions of KRS 501.060.

than the instruction actually given at his trial because Cardona's instructions considered only the "risk" element as embodied in the definition of "wantonly," whereas the instruction approved in Robertson added a "substantially more probable" prong to the instructions. Hence, Cardona, like the defendant in Robertson, was not prejudiced by the trial court's failure to give the currently approved second-degree manslaughter instruction. Robertson at 839.

The precedents established by the Supreme Court bind this Court. SCR 1.030(8)(a); Smith v. Vilvarajah, Ky. App., 57 S.W.3d 839, 841 (2000). As such, we are bound by its holding as to the proper manslaughter instruction as set forth in Robertson. Since the instruction given was more favorable to Cardona, Robertson requires us to affirm on the instruction issue raised by Cardona.

However, because Robertson did not specifically address the intervening cause issue, and for other reasons,[3] we will briefly address the merits of the specific instruction

[3] The dissent in Robertson followed hornbook law in pointing out that KRS 501.060(2) and (3) place a limitation on the causation-in-fact requirement of KRS 501.060(1) and do not furnish an alternative path for finding guilt. A simple example illustrates this point. A doctor is faced with a crisis during surgery. The Doctor could choose to do nothing, but the patient would come out of the surgery with devastating, but not life threatening, handicaps. Alternatively she could choose to perform a procedure which would allow the patient to lead a normal life but would make the patient's death "substantially more probable." If the doctor takes the second course and the patient dies, she should not be guilty of Manslaughter because she had acted reasonably. However, under the alternative "substantially more probable" theory contained in the instruction suggested in Robertson the Doctor would be guilty of second-degree manslaughter. Fortunately the suggested instruction is dicta, but dictum can become stictum.

tendered by Cardona. The tendered instruction stated as follows:

> Even though you believe from the evidence beyond a reasonable doubt that the Defendant's conduct on or about October 20, 2000 was wanton as defined in Instruction No. 9, you will find the Defendant not guilty if Sefusa Custic violated KRS 189.570 by failing to yield the right-of-way to the Defendant's motor vehicle while crossing the roadway at a location other than within a marked crosswalk, or by suddenly leaving a curb or other place of safety and running into the path of the Defendant's motor vehicle, or by walking upon the roadway when a sidewalk was otherwise available, and her action in so doing constituted an intervening cause which was not foreseeable by the Defendant and for which the Defendant can therefore not be held responsible.

While courts have frequently spoken in terms of an intervening cause cutting off the defendant's liability, in the instant situation KRS 501.060 specifically addresses the issues raised by Cardona's proposed instruction and controls. Robertson, supra; Lofthouse v. Commonwealth, 13 S.W.3d 236 (2000). KRS 501.060 provides, in relevant part, as follows:

> (1) Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.
>
> ...
>
> (3) When wantonly . . . causing a particular result is an element of the offense, the element is not established if the actual result is not within the risk of which the actor is aware . . . unless:

> (a) The actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
>
> (b) The actual result involves the same kind of injury or harm as the probable result and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.
>
> (4) The question of whether an actor knew or should have known the result he caused was rendered substantially more probable by his conduct is an issue of fact.

This statutory scheme uses a three-part test. First, to impose liability a defendant's conduct must satisfy subsection (1), that is, it must be the cause-in-fact of the harm. Second, however, even if the defendant caused the harm he is not liable if under the first paragraph of subsection (3) he was unaware of the risk that ultimately caused the harm. Lastly, the subsection (3) escape hatch is subject to its own exceptions as set out in paragraphs (a) and (b) of the subsection. These paragraphs make the defendant liable even though he was unaware of the risk that actually caused the harm if the ultimate result is sufficiently closely akin to the probable result he was aware of.

As noted above, KRS 501.060(1) represents the cause-in-fact test. A defendant cannot be liable unless his conduct is

at a minimum the cause-in-fact of the harm. The conduct in question here is Cardona's conduct; specifically his driving a car while intoxicated and whether his conduct was an antecedent cause of the accident. Because the statutory causation issue concerns Cardona's conduct, and not the conduct of the victim, this KRS 501.060(1) does not provide support for the proposed instruction.

The cause-in-fact test (alternatively called the "but-for" test) casts a wide net.[4] KRS 501.060(2) (for intentional crimes) and KRS 501.060(3) (for wanton and reckless crimes) limit the broad sweep of the cause in fact test.[5]

Under KRS 501.060(3) the focus is again on Cardona's conduct. This subsection was adopted from alternative section 2.03 of the Tentative Draft No. 4 of the Model Penal Code. The

[4] For example, if Cardona's erratic driving had caused another driver to slow down so as to later reach a railroad crossing in time to be killed by a train, he would be the cause-in-fact of the death under KRS 501.060(1). If the other driver had not slowed down to avoid Cardona he would have crossed the tracks before the train got to the crossing and lived.

[5] The Comments to the ALI Model Code use the following example to illustrate the limitations of the cause-in-fact test's reach:

> Viewed in these terms, it may be said that either the proposed or the alternative formulation should suffice for the exclusion of those situations where the actual result is so remote from the actor's purpose or contemplation that juries can be expected to believe that it should have no bearing on the actor's liability. . . . If, for example, the defendant attempted to shoot his wife and missed, with the result that she retired to her parent's country home and then was killed in falling off a horse, no one would think that the defendant should be held guilty of murder though he did intend her death and his attempt to kill her was a but-for cause of her encounter with the horse.

statute abandons the “proximate cause” and “intervening cause” language, adopting different criteria to resolve the same problem. "[T]he plain intent of the statute is to have the causation issue framed in all situations in terms of whether or not the result as it occurred was either foreseen or foreseeable by the defendant as a reasonable probability." Lofthouse at 239 (citing R. Lawson and W. Fortune, Kentucky Criminal Law, § 2-4(d)(3), at 74 (LEXIS 1998)).

Further, under subsection (3) an actor is not liable for the harm he causes unless the result is “within the risk of which the actor is aware.” Cardona knew that a pedestrian might cross the highway at other than a designated crosswalk, that a child or adult might attempt to cross the highway despite there being an oncoming vehicle, and that a pedestrian might walk on a sidewalk when one is otherwise available. These events are readily foreseeable and hence known to a reasonable person. Additionally, Cardona knew that if a driver is intoxicated his reaction time, his cognitive abilities, and his judgment will be impaired such that he may not be able to avoid an accident that he otherwise could have avoided had he not been intoxicated. Indeed this issue is not seriously in dispute.

As these matters were known to Cardona, they are matters “within the risks of which the actor is aware” identified in KRS 501.060(3). As such it was not necessary for

the court to address, by instructions or otherwise, the exceptions to the exception that are found in paragraphs (a) and (b) of KRS 501.060(3). See Luttrell v. Commonwealth, Ky. 250 Ky. 334, 63 S.W.2d 292, 294 (1933) (Instructions are only required on matters about which there is some issue to be presented to the jury.) These paragraphs impose liability in certain situations where the actor was unaware of the risk that resulted in the harm. This was the situation the Supreme Court purportedly dealt with in Robertson.

In summary, the instruction proposed by Cardona would have the possible effect of negating the statutory causation provisions of KRS 501.060. As such, Cardona was not entitled to the tendered intervening cause instruction.

Moreover, Kentucky follows the "bare bones" principle with respect to jury instructions. Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 850 (2000). Instructions such as those requested by Appellant tend to overemphasize particular aspects of the evidence. Id. Evidentiary matters should be omitted from the instructions and left to the lawyers to flesh out during closing arguments. Baze v. Commonwealth, Ky., 965 S.W.2d 817, 823 (1997); McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 936 (1994). In fact, in arguing the proposed jury instruction, the Commonwealth stated that Cardona was free to argue in closing

arguments that the fault for the accident lay with Elvidina and Sefua Custic because they darted in front of his vehicle.

Finally, in support of his instruction, Cardona cites us to various foreign-jurisdiction cases. These cases either apply common law principals or interpret statutes that do not track our own. We are constrained to follow the Kentucky statute.

For the foregoing reasons, the judgment below is affirmed.

COMBS, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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