

RENDERED: July 16, 2004, 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2002-CA-000343-MR

DELBERT BUTTREY

APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT  
HONORABLE JOHN ROBERT MORGAN, JUDGE  
ACTION NO. 01-CR-00009

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; TACKETT AND VANMETER, JUDGES.

VANMETER, JUDGE: This appeal is from a judgment entered by the Knott Circuit Court after a jury found appellant, Delbert Buttrey,<sup>1</sup> guilty of unlawful imprisonment first degree and wanton endangerment first degree. The trial court sentenced appellant in conformity with the jury's ten year recommendation. We affirm.

On October 30, 2000, the appellant agreed to give Beth Ann Tate a ride from London to Pikeville. Tate was en route

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<sup>1</sup> In the circuit court, and in the notice of appeal, the appellant's last name is stated as "Buttrey." Both parties' appellate briefs state the appellant's last name as "Buttery."

from Oklahoma to Pikeville to attend a child custody hearing. Mary Chaney, manager of the truck stop where appellant's son worked in London, testified that when the two left London, Tate appeared tired, but was neat and clean and had no cuts or bruises. During the ride to Pikeville, appellant exited the main highway and began traveling on less heavily trafficked roads. At some point, Tate began to get a "bad feeling" about appellant, as he was asking her questions that she was not comfortable with. Knowing that she did not want to be in the car anymore with appellant, Tate asked to be let out. Appellant replied that Tate was making him nervous and he showed her a gun. Tate then tried to unlock the car door, but the lock had been cut off. Tate then "begged" appellant to stop and let her out, but he refused. Tate then rolled down the window and jumped out of the car, head and arms first, hitting the pavement with her head, and rolling beside the road.

Tate got up and began to walk toward the highway. She saw appellant had turned around and was coming back. Tate's testimony was that appellant got out of his car and raped and sodomized her in a field beside the road. After she kicked appellant, she was able to get away and was picked up by an elderly couple who took her to Pikeville.

Appellant did not testify at trial, but gave a statement to the police that he took Tate to the Pikeville Homeless Shelter.

As noted above, appellant was convicted of false imprisonment first degree and wanton endangerment first degree and was sentenced to ten years' imprisonment.<sup>2</sup> This appeal followed.

Appellant's argument on appeal is that the trial court erred in failing to grant a directed verdict of acquittal on each of the unlawful imprisonment and wanton endangerment counts. We disagree.

The Kentucky Supreme Court has held: "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." *Johnson v. Commonwealth, Ky.*, 90 S.W.3d 39, 42 (2002) (quoting *Commonwealth v. Benham, Ky.*, 816 S.W.2d 186, 187 (1991)). On a motion for directed verdict, all fair and reasonable inferences from the evidence are to be drawn in favor of the Commonwealth. *Benham*, 816 S.W.2d at 187. And, as has

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<sup>2</sup> On count 2 of the indictment, rape first degree, the jury found appellant guilty of the lesser offense of criminal attempt, sexual abuse first degree; on count 3 of the indictment, sodomy first degree, the jury found appellant guilty of the lesser offense of criminal attempt, sexual abuse first degree. The jury sentenced appellant to twelve months and a \$500 fine on each of those counts.

been frequently noted, “[c]redibility and weight of the evidence are matters within the exclusive province of the jury.”

*Commonwealth v. Smith*, Ky., 5 S.W.3d 126, 129 (1999).

At trial, concerning unlawful imprisonment, appellant offered as a basis for directed verdict that appellant had not intentionally, knowingly or unlawfully caused Tate’s injuries, since Tate had jumped from the moving vehicle of her own volition.<sup>3</sup> Similarly, appellant argued he was entitled to a directed verdict on the wanton endangerment count on the basis that he did not manifest extreme indifference to human life. Appellant’s reasoning, again, was that Tate jumped out of the car.

The elements of unlawful imprisonment first degree are that a person (a) knowingly and unlawfully restrains another person, (b) under circumstances which expose that person to a risk of serious physical injury. KRS 509.020. The statute does not require the victim to suffer serious physical injury, only that the circumstances expose the victim to the risk of serious physical injury. In *Baker v. Commonwealth*, Ky., 973 S.W.2d 54, 55 (1998), the court held that testimony that the victim had actually received injuries, was threatened by the appellant, and

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<sup>3</sup> On appeal, appellant adds the grounds for directed verdict that Tate had not been restrained, had not been exposed to serious physical injury, and that Tate was not credible as a witness. None of these grounds was argued before the trial court in appellant’s motion for directed verdict. A party may not advance one theory before the trial court, and another before the appellate court. *Shelton v. Commonwealth*, Ky. App., 992 S.W.2d 849, 852 (1998).

had her feet dangling out of an open door when abducted were sufficient proof to support a finding under KRS 509.020 of a risk of serious physical harm.

The elements of wanton endangerment are (a) under circumstances manifesting extreme indifference to human life, (b) wantonly (c) engaging in conduct which creates substantial danger of death or serious physical injury to another person. KRS 508.060.

Appellant's argument on both counts is essentially that he did not create the risk of death or serious physical injury, but that Tate did so by her own action in exiting a moving car. In *Robertson v. Commonwealth, Ky.*, 82 S.W.3d 832 (2002), the court undertook an extensive analysis of criminal causation and KRS 501.060 (causal relationships). Essentially, a criminal defendant is not exonerated by another person's volitional act if that act was either foreseen or foreseeable by the criminal defendant as a reasonably probable result of the criminal defendant's own unlawful act. *Id.* at 836.

*Sanders v. Commonwealth*, 244 Ky. 77, 50 S.W.2d 37 (1932), a pre-criminal code case, was cited in *Robertson* to illustrate the causation issue.<sup>4</sup> The facts in *Sanders* were that a husband had either attacked his wife or put her in such fear

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<sup>4</sup> In addition to being cited in *Robertson*, *Sanders* has recently been cited in *Phillips v. Commonwealth, Ky.*, 17 S.W.3d 870, 873 (2000); *Lofthouse v. Commonwealth, Ky.*, 13 S.W.3d 236, 239 (2000).

of attack that she opened the door of a moving car and jumped off, thereby sustaining injuries that caused her death. In upholding a manslaughter conviction, the court stated the rule "that a person, who by actual assault or threat of violence causes another, acting upon reasonable fear or apprehension, to do an act resulting in injury causing his death, is responsible for the homicide." 244 Ky. at 82, 50 S.W.2d at 39.

Based on the evidence produced, our view is that the circumstances were such as to expose Tate to a risk of serious physical harm. While not everyone in the situation would attempt to exit a moving vehicle, it is reasonably foreseeable that someone would attempt to get away from a perpetrator, logically as the car slowed in making a turn down a side road. Given that the perpetrator would not permit exit and had flashed a gun, Tate's act was foreseeable by appellant. Therefore, the trial court did not err in failing to direct a verdict in favor of the appellant.

The judgment of the Knott Circuit Court is affirmed.

ALL CONCUR.

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