

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000406-MR

MARK ANTHONY PRICE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 01-CR-00367

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, JOHNSON, AND BAKER, JUDGES.

BARBER, JUDGE: Appellant Mark Price was charged with receiving stolen property, first degree fleeing and evading, and first degree wanton endangerment. Price was also charged with being a persistent felony offender. Price was operating a stolen vehicle when a police officer recognized the vehicle as stolen, and attempted to arrest Price. Rather than surrendering immediately, Price drove himself to the county jail. Once he

reached the jail, Price surrendered himself to the police and was taken into custody.

At the time Price was arrested, he was free on bond in a vehicular theft case. During Price's cross-examination, the prosecutor asked Price if he was a convicted felon. Price admitted that he was. The trial court admonished the jury with regard to that question. The prosecutor went on to question Price about vehicles he owned. When Price stated that he owned a Cadillac and a truck, the prosecutor asked "Are you sure you didn't steal it?" Defense counsel objected to the question, and the trial court sustained the objection. No admonition was requested or given. On appeal, Price argues that the prosecutor's blatantly inappropriate comments made it more likely that the jury would convict him on the charges of auto theft.

KRE 404(b) requires that "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." Evidence of other crimes is not permissible where it is used to prove the criminal disposition of the accused. Thacker v. Commonwealth, Ky. App., 816 S.W.2d 660, 661 (1991). "An accused is entitled to be tried for one offense at a time, and evidence must be confined to that offense." Robey v. Commonwealth, Ky., 943 S.W.2d 616, 618 (1997). Introduction of evidence of prior

bad acts, especially where those acts are similar to the charge the defendant is facing, constitutes reversible error. See: Osborne v. Commonwealth, Ky. App., 867 S.W.2d 484 (1993).

The Commonwealth argues that this claim of error is unreserved for review. The Commonwealth asserts that as Price did not ask for an admonition at that time, he cannot claim that the prosecutor's comments were reversible error. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 28 (1998). The Commonwealth also argues that the error was harmless.

Where evidence of other crimes is admitted by the trial court, the reviewing court must consider all of the evidence to determine whether the accused was unduly prejudiced. Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984). Here, the jury was admonished by the trial court not to consider Price's admission of his earlier felony conviction as proof of his guilt on the pending charges. The trial court also sustained the defense objection to the prosecutor's remark about theft. Price did not ask for a second admonition. Under such circumstances, we do not find reversible error.

Price also asserts that the trial court erroneously denied his motion for a directed verdict, made on the grounds of insufficiency of the evidence at trial. Reversible error occurs if, on appellate review, the record shows that it would clearly

be unreasonable for the jury to find the defendant guilty.
Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

Price argues that the Commonwealth did not prove that he had knowledge that the vehicle was stolen, which is an essential element of the offense of receiving stolen property. Knowledge that the property is stolen is the controlling element of the offense of receiving stolen property. Magruder v. Commonwealth, Ky., 488 S.W.2d 697, 698 (1972). Price testified under oath that he did not know that the vehicle was stolen. The Commonwealth proved that the truck was stolen, but could not prove that Price stole it. KRS 514.110 holds that "[t]he possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen." Id., at subsection (2).

"[T]he verdict of a jury must be sustained if there is substantial evidence to support it, taking the view most favorable to the Commonwealth." Commonwealth v. Jones, Ky., 880 S.W.2d 544, 545 (1994). The jury determines the weight and credibility of the witness' testimony. Commonwealth v. Cox, Ky., 837 S.W.2d 898, 900 (1992). Based on the presumptions in the law, and the testimony of the witnesses, the jury found that Price had stolen the vehicle. No error is pleaded requiring reversal of the jury's determination.

Price argues that the Commonwealth did not show that he was intentionally fleeing and evading arrest when he drove himself to the jail. The record shows that Price headed straight to the jail and that he took the most direct route possible to get there. The record also shows, however, that Price drove at speeds up to 110 miles per hour, and that several police cars with lights and sirens on followed him along the highway for many miles. Price stated under oath that he feared for his safety in surrendering to the officer at the remote gas station, and that he felt safer in surrendering at the jail, in view of the public.

KRS 520.095(1) requires that the Commonwealth show that the defendant "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. . . ." Id., emphasis supplied. Price asserts that he had no intent to flee or elude the officers, but that he was ensuring his own safety. Obviously, by fleeing from the police Price made himself, the pursuing officers, and everyone else on the roadway substantially less safe. Price's refusal to stop his vehicle at police request satisfies the requirements of KRS 520.095. We affirm the trial court's judgment.

Price was also convicted of wanton endangerment for his reckless driving, and for tossing an object at the police

car during the pursuit. He argues that the record showed that he drove to the jail in a safe manner, and no evidence of wanton endangerment exists. Price does admit, however, that his speed exceeded 90 miles an hour during the drive. Police officers were required to block access to the highway for the safety of the public, and motorists pulled off the roadway to avoid injury when Price passed. The record also shows that Price threw a beer can at a pursuing police car. A person acts wantonly when his conduct involves a risk which constitutes "a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Hancock v. Commonwealth, Ky. App., 998 S.W.2d 496, 498 (1998), quoting KRS 501.020(3). Wanton endangerment is not limited to any specific conduct, but may include obstructing the highway, or endangering others. Hennemeyer v. Commonwealth, Ky., 580 S.W.2d 211, 214 (1979). Clearly, the wanton endangerment conviction was warranted.

Price further argues that the trial court erred in failing to instruct the jury on the lesser offense of unauthorized use of a motor vehicle pursuant to KRS 514.100.

RCr 9.54(2) requires a party objecting to an instruction or failure to instruct to make a specific objection before the trial court. In order to preserve an error regarding instructions for appellate review, objections to instructions are mandatory. Commonwealth v. Goforth, Ky., 692 S.W.2d 803

(1985). A defendant must seek an instruction before he can request review of the trial court's failure to give that instruction. Perdue v. Commonwealth, Ky., 916 S.W.2d 140, 148 (1995). As Price failed to request such an instruction, we cannot find reversible error in the trial court's failure to give it, unless he can demonstrate palpable error.

Price claimed that he borrowed the truck from a friend, and that he had no idea that it had been stolen. While it is questionable whether the offense of unauthorized use of a motor vehicle is a lesser included offense of receiving stolen property, the evidence clearly did not support the instruction. The failure to give that instruction was not palpable error since the evidence did not support the instructions.

For the foregoing reasons, the judgment of the circuit court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Dennis Stutsman
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky
Frankfort, Kentucky

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky