

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000578-MR

JERRY THOMAS SPEIGHT

APPELLANT

v. APPEAL FROM HICKMAN CIRCUIT COURT  
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE  
ACTION NOS. 01-CR-00026 & 01-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BAKER, BARBER, AND JOHNSON, JUDGES.

BAKER, JUDGE. Jerry Thomas Speight appeals from his conviction for one count of fleeing and evading police in the first degree<sup>1</sup> and persistent felony offender in the first degree(PFO I)<sup>2</sup>. We affirm.

On September 14, 2001, the Hickman County Sheriff, J.W. Moran saw Speight walking in Clinton, Kentucky. Because he had a warrant for Speight's arrest, he got into his car to

---

<sup>1</sup> Kentucky Revised Statutes (KRS) 520.095.

<sup>2</sup> KRS 532.080(3).

follow Speight. When he caught up with Speight, Speight was getting into the driver's seat of a rust colored Chevy Citation. Speight's wife Carol, her young daughter and the couples' dog were in the car at the time. Sheriff Moran pulled his car up next to Speight's car, close enough to make it difficult for Speight to exit the car. At this point there was conflicting testimony as to what happened. Sheriff Moran testified that he exited his vehicle, taking his handcuffs, and approached the driver's side of Speight's vehicle. By all accounts, the driver's side window was open. Sheriff Moran testified that he told Speight he had a warrant for his arrest and Speight would need to come with him. The Sheriff testified that he put his hands inside the window in order to handcuff Speight before he got out of the car, that Speight indicated his acquiescence but then sped away. The Sheriff testified that when Speight sped away, he was spun around and also had to jump back to avoid being hit by the vehicle. Sheriff Moran testified that he did not follow Speight in his car because he had not seen in which direction he had fled. A short time later Speight dropped his wife and the child off at a home in Columbus, Kentucky. He turned himself into the sheriff's office several weeks later.

At first, Carol Speight testified that Sheriff Moran's hands were not in the vehicle and that Speight drove away at a normal speed. When pressed by the prosecutor, she admitted that

she really didn't know whether Sheriff Moran's hands were inside the vehicle. Speight testified that Moran did not attempt to handcuff him and did not put his hands in the car. He admitted that he did not want to be arrested that day and that he drove away to avoid the arrest. He also testified that he drove away at a normal rate of speed.

Speight was indicted by the Hickman County Grand Jury on one count of fleeing or evading police in the first degree and one count of PFO in the second degree. He was later reindicted for fleeing or evading police in the first degree and for PFO in the first degree. Speight was tried on the fleeing and evading count on November 21, 2001. The jury found Speight guilty, and after the sentencing phase recommended a sentence of 5 years' imprisonment. Speight was tried separately for PFO I on March 19, 2002, because he had not yet been arraigned on the PFO charge at the time of the November trial. Speight was found guilty of PFO I and the 5-year sentence was enhanced to a total of 15 years.

Speight argues on appeal that the trial court erred in 1) failing to grant a continuance at the request of defense counsel; 2) denying the defense motion for directed verdict; 3) failing to grant a mistrial; 4) admitting KRE 404(b) evidence of other crimes, wrongs or acts; 5) allowing Sheriff Moran to serve as bailiff in charge of the jury during the PFO trial.

On the morning of trial on the fleeing and evading charge, defense counsel requested a continuance. In support of his request, he argued that the Department of Corrections (Corrections) had failed to transport Speight from the Kentucky State Reformatory in LaGrange, Kentucky the day before. As a result he was only able to meet face to face with Speight for thirty minutes. When asked by the trial court what other contact he had with his client, counsel stated that he had conducted several phone interviews but was concerned about the possibility of those calls being monitored by Corrections. The trial court denied the motion, stating that it would be more sympathetic to the request if the jurors had not already arrived at the courthouse. On appeal, Speight argues that it was an abuse of discretion for the trial court to deny the request for a continuance because inconvenience to the jury is not one of the seven factors outlined in Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991).

We agree with Speight that the trial court failed to analyze his motion for a continuance according to the Snodgrass factors, which are: (1) length of delay sought; (2) previous continuances; (3) inconvenience to litigants, witnesses, counsel, and the court; (4) whether the delay is purposeful or is caused by the accused; (5) availability of other competent counsel, if at issue; (6) complexity of the case; and (7)

whether denying the continuance would lead to identifiable prejudice. Id. at 581.

Factors 2 and 4 weigh in favor of Speight. There is no indication in the record of previous continuances. Clearly, the delay was not the fault of the defense, in that the court had issued an order for transport and Corrections failed to transport Speight until the morning of trial.

As to factors 1 and 3, we cannot conclude that they weigh in favor of granting or denying a continuance. Defense counsel did not state the length of delay he was requesting. Since the motion for a continuance was based on the fact that Speight was to have been transferred the day before trial, one can assume that counsel would not have been requesting more than a one-day delay. However, we cannot know how soon a new trial could be scheduled. We do believe that the trial court's concern that the jury was already at the courthouse implicates an inconvenience to the court. On the other hand, since the only witnesses at trial were Speight, his wife and the Sheriff, it does not appear that there would have been great inconvenience to them.

Factor 6 weighs in favor of denying a continuance, because there was nothing complex about the case. It was merely a question of the credibility of the witnesses.

This brings us to the question of prejudice. Speight claims he was prejudiced in that he had a lack of opportunity to develop an attorney-client relationship. As evidence that he was prejudiced by the lack of time counsel had to discuss his testimony, Speight states that he "did not help his case during the sentencing phase by asking the jury not to send him away for ten to twenty years on a PFO charge for which he was not yet on trial." We fail to see how this prejudiced Speight. The evidence of his prior felonies was properly admitted during the sentencing phase. His comment was in response to that evidence and was an attempt to mitigate punishment. Speight argues that if counsel had more time to prepare his case and his client more fully there was a substantial possibility that the jury would have acquitted him of fleeing and evading and would only have convicted him of resisting arrest. However, he offers no evidence that could or would have been presented that supports this argument. There were no witnesses except Speight, the Sheriff and Speight's wife, and each told their version of the events. Our review of the record establishes that counsel was adequately prepared for trial. The record also establishes that the trial court granted a defense counsel motion for a continuance after the Commonwealth presented its case, in order to allow counsel to meet with Speight and discuss his testimony. The seventh Snodgrass factor requires a showing of "identifiable

prejudice." Speight has simply failed to show identifiable prejudice.

A continuance may be granted upon a showing of sufficient cause. Kentucky Rules of Criminal Procedure (RCr) 9.04; Snodgrass 814 S.W.2d at 581. The decision as to whether to grant a continuance is within the sound discretion of the trial court based upon the unique facts and circumstances of the case. Id. Under the circumstances, we cannot say that the trial court abused its discretion in denying the continuance.

Speight next argues that there was insufficient evidence to support a conviction for fleeing and evading police in the first degree and therefore, the trial court erred in not granting his motion for a directed verdict.

KRS 520.095(1)(a)(4) states,

By fleeing or eluding, the person is the cause, or creates a substantial risk of serious physical injury or death to any person or property.

Speight argues that there was "no evidence of substantial risk of serious physical injury or death" and that resisting arrest was the much more appropriate charge.

Sheriff Moran testified that his arms were inside the car and he was attempting to handcuff Speight. He stated that Speight indicated he was going to comply but, while the Sheriff's hands were inside the window, he "floored it." On

cross-examination, Sheriff Moran admitted that he could not see Speight's foot and whether it was actually on the floor but insisted that Speight drove away "as fast as the car would go." The Sheriff testified that the door post of the car caught him on the right arm and spun him around and that he had to jump back quickly to avoid being hit.

On a 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. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

Clearly, based on Sheriff Moran's testimony a reasonable juror could conclude that Speight created a "substantial risk of serious physical injury" when Speight drove off with the Sheriff's arms inside his car.

Speight's next argument is that the trial court erred in denying his motion for a mistrial. The motion for a mistrial was based on the following statement by the prosecutor during closing argument:

You are going to decide who to believe; Sheriff J.W. Moran, who put his hand on the Bible and swore to tell the truth and said he did or are you going to believe Tommy Speight, who tells us he has been convicted of felonies?

Speight moved for a mistrial, objecting that the prosecutor misstated the burden of proof and misstated the evidence by using the word felonies instead of felony. The trial court admonished the jury to disregard the word "felonies" and to instead insert the word "felony." However, our review of the record establishes that Speight did actually testify that he had been convicted of "felonies". As such, there was no misstatement of the evidence.

Regarding the burden shifting argument, we do not believe the statement shifted the burden from the Commonwealth, but rather was proper comment on the credibility of the witnesses. The prosecutor is entitled to attack a defendant's credibility if the defendant testifies as a witness on his own behalf. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 38 (1998). The defense position throughout the trial was that the Sheriff was not telling the truth about what actually happened. The prosecutor was entitled to give an invited response. See Foley v. Commonwealth, Ky., 953 S.W.2d 924, 940 (1997).

The record must reveal a manifest necessity for a mistrial before such an extraordinary remedy will be granted. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985). A trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion. Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 863 (2002). Because the statement by the

prosecutor was proper, the trial court did not abuse its discretion in denying the motion for a mistrial.

Speight's next argument is that the trial court erred in allowing testimony as to the fact that Sheriff Moran had a warrant for Speight's arrest. Defense counsel moved in limine to exclude testimony that Sheriff Moran was attempting to arrest Speight for a parole violation. The Commonwealth agreed not to reveal the underlying basis for the arrest warrant but argued that the fact that Moran had a warrant for Speight's arrest was necessary to prove that Speight drove off to elude apprehension. The trial court denied the motion to exclude the evidence.

Kentucky Rules of Evidence (KRE)404(b) states:

Other crimes, wrongs, or acts. 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, knowledge, identity, or absence of mistake or accident.

The Commonwealth was required to prove that Speight intended to elude or flee. KRS 520.095. We believe the arrest warrant was competent evidence that Speight intended to elude or flee and also that he had motive to do so. The reason for the underlying arrest warrant was not explained to the jury. As such, there was no error.

Speight's final argument is that he was substantially prejudiced by Sheriff Moran acting as bailiff in charge of the jury in the PFO trial. Speight admits that this issue is unpreserved but requests review pursuant to RCr 10.29 for palpable error.

Speight was not tried on the PFO charge until March 19, 2002, some four months after the trial for fleeing or evading. The PFO trial was delayed at the request of the defense because Speight had not been arraigned for PFO in the first degree. At the PFO trial, Sheriff Moran served as the bailiff to the jury. On appeal, Speight cites Gonzales v. Beto, 405 U.S. 1052, 92 S. Ct. 1503, 31 L. Ed. 2d 787 (1972), in support of his argument that he was denied due process of law and a fair trial by the use of Moran as bailiff.

In Gonzales the Supreme Court held:

When a key witness against a defendant doubles as the officer of the court specifically charged with the care and protection of the jurors, associating with them on both a personal and an official basis while simultaneously testifying for the prosecution, the adversary system of justice is perverted. Id. at 1055-1056, 92 S.Ct. at 1505, 31 L. Ed. 2d at 789.

Gonzales is clearly distinguishable from the case sub judice. In Gonzales, the Sheriff was the key witness against the defendant and served as the bailiff for the jury in the same trial. In reversing Gonzales' conviction, the Court focused on

the fact that the witness-bailiff's role was "inevitably driven home to the jury," stating, "For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial."

Id. The jury who sat in Speight's PFO trial was not the same jury as sat in his trial for fleeing and evading. Sheriff Moran did not testify in the PFO trial. Speight makes no argument that Sheriff Moran attempted to influence the jury or that the jury even knew Sheriff Moran was the witness against Speight at the first trial. While we would not recommend this procedure, we decline to apply a presumption of prejudice on the facts of this case.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Rebecca Ballard DiLoreto  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Wm. Robert Long, Jr.  
Assistant Attorney General  
Frankfort, Kentucky