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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001259-MR

SHAWN I. HATTON

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 01-CR-00152

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.

TACKETT, JUDGE: Shawn Hatton appeals from the judgment of the Montgomery Circuit Court convicting him of second-degree arson and sentencing him to twelve years' imprisonment. The sole issue before this Court is whether Hatton was entitled to a lesser-included instruction or alternative instructions on the wanton criminal mischief charge. We affirm.

At the time the incident occurred, Hatton and his wife were renting a mobile home in Mt. Sterling, Kentucky. Shortly after moving into the home, Hatton and his wife separated. On

September 20, 2001, Hatton's wife, Nesha, accompanied by her mother's boyfriend, Michael Wagoner, returned to the trailer to retrieve some clothing for herself and the couple's two children. Hatton was in the kitchen of the trailer when Nesha arrived and had been drinking. He pleaded with his wife not to leave him. She testified at trial that he told her to stay or he would burn down the trailer. When she refused to stay, Hatton took out a lighter and ignited a box of clothing in the bedroom where Nesha was packing. The box did not continue to burn, however, and Nesha told Wagoner that Hatton had "lost his mind," and the two exited the trailer, leaving Hatton alone inside. (Trial at 73, 79-80). Hatton then went into the back bedroom of the trailer and ignited a piece of paper and threw it on a mattress. He quickly left the premises and the trailer was completely engulfed in flames by the time Nesha and Wagoner traveled the short distance to the end of the driveway.

Hatton was apprehended shortly thereafter by the sheriff and confessed to starting the fire. He was indicted for arson and the offense was tried before a jury. Through counsel, Hatton requested that the jury be instructed not only on all degrees of arson, but on all degrees of criminal mischief, as well. The trial court agreed to instruct the jury as to voluntary intoxication, but refused to instruct the jury on criminal mischief. The jury acquitted Hatton on the charge of

first-degree arson, but convicted him of second-degree arson and the trial court sentenced him to twelve years. This appeal followed.

Appellant argues on appeal that the court's ruling was in error because the jury was not given instructions on criminal mischief pursuant to Appellant's request. A trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser-included offenses supported by the evidence. Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 72 (2001), citing Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998). However, that duty does not require an instruction on a theory with no evidentiary foundation. Id. Lesser-included offenses are appropriate only when the state of the evidence is such that a juror might entertain reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond reasonable doubt that the defendant is guilty of the lesser offense. Jacobs v. Commonwealth, Ky., 58 S.W.3d 435, 446 (2001) citing Billings v. Commonwealth, Ky., 843 S.W.2d 890, 894 (1992).

It is clear that criminal mischief is not a lesser-included degree of arson. In the commentary regarding the three degrees of arson, Kentucky Instructions to Juries, sec. 5:17, p. 291 states that there are no lesser-included offenses to arson. Furthermore, a lesser-included offense must be established by proof of the same or less than all of the facts required to

establish the commission of the charged offense. Kentucky Revised Statute 505.020(2)(a); Commonwealth v. Day, Ky., 983 S.W.2d 505, 509 (1999), citing Perry v. Commonwealth, Ky., 839 S.W.2d 268, 272 (1992). Criminal mischief contains the additional statutory element of valuation. This was a prosecution for arson in which no evidence of valuation was introduced at any time during the proceedings. This lack of an evidentiary foundation further precludes an instruction on criminal mischief as a lesser offense.

Appellant also urges that if the Court does not find criminal mischief to be a lesser-included offense of arson, then it must be included as an alternative offense. "The general rule is that 'the court is required to instruct on every state of the case reasonably deducible from the evidence.'" Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 549 quoting Ragland v. Commonwealth, Ky., 421 S.W.2d 79, 81 (1967). Where the evidence is such that the jury could come to any of several conclusions, the trial court is required to submit the tendered instructions on the various alternatives. Sanborn, supra, 754 S.W.2d at 549 citing Pace v. Commonwealth, Ky., 561 S.W.2d 664, 667 (1978). However, the evidence in the case at hand was not of such a nature that could lead the jury to any of several conclusions. Therefore, there were no alternative offenses required in this case.

The facts in Sanborn are readily distinguishable from the facts in this case. In Sanborn, defendant's theory of the case was that the offenses of which he had been convicted had been committed after the victim's death. Sanborn, supra, 754 S.W.2d at 550. If true, the defendant would have been guilty of a completely different offense than the one for which he was convicted. In this case, Appellant's theory was not that the elements of arson had not been proven or that Appellant had not committed arson. Instead Appellant urges that due to his allegedly wanton state of mind, as opposed to the requisite intentional *mens rea* required for arson, he was entitled to an instruction on the less serious offense of criminal mischief. Ultimately, this argument is identical to Appellant's argument with respect to lesser-included offenses, and is not truly an argument for an alternative offense at all. Simply put, Sanborn does not require an alternative offense in the situation presented by Appellant.

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

ALL CONCUR.

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