

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001394-MR

THOMAS RAY BURKHEAD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CR-002504

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, GUIDUGLI, AND VANMETER, JUDGES.

BARBER, JUDGE: Appellant Thomas Ray Burkhead (hereinafter "Burkhead"), appeals his conviction of wanton first degree assault. We affirm the trial court's judgment.

Thomas Burkhead was charged with striking an acquaintance with an automobile, causing severe physical injury to Jackson Schildknechk (hereinafter "Schildknechk"), the victim. At trial, Burkhead testified that he was driving his brother's car, made a right turn onto a narrow alley, and momentarily lost control of the vehicle when he reached to catch

some CDs that were slipping from the dash. Burkhead did not stop at the scene, and testified that he was scared of the consequences. Burkhead testified that the accident was caused through negligence.

Schildknechk was walking along the alley, about 100 feet from the intersection, when he was struck by the vehicle. Schildknechk testified that he saw Burkhead driving the vehicle, and attempted to jump out of the way. The car struck him and he hit his head on the curb. Schildknechk is now paralyzed from the chest down. Schildknechk gave the investigating officer Burkhead's name, as the individual who had struck him with the car.

Schildknechk testified that he had bought drugs from Burkhead in the past, and that at the time he was struck by the car, he was "a little late" in paying for his latest purchase. He testified that he saw the car coming at him fast, and that he heard tires squealing. He claimed that the car's wheels came up on the curb and he was struck by the front of the vehicle. Schildknechk also testified as to a fight he and Burkhead had the night before he was hit by the car, after which Burkhead was taunted by passersby for losing to Schildknechk.

The trial court instructed the jury on attempted murder, intentional or wanton first degree assault, and second degree assault. The jury found Burkhead guilty of wanton first

degree assault. Burkhead objects to the trial court's instruction on wanton first degree assault, asserting that the evidence did not support a finding of extreme indifference to the value of human life. The record shows that there were no skid marks or acceleration marks at the scene. There was no accident reconstruction by the prosecution. Burkhead argues that the evidence does not support a finding of anything other than an accidental striking of the victim. Burkhead also argues that he was not permitted to show that he did not exhibit extreme indifference to the value of human life.

The Commonwealth argues that instructions must be based on the totality of the evidence, as required by Mabe v. Commonwealth, Ky., 884 S.W.2d 668 (1999). The Commonwealth claims that the trial court's instructions were appropriate based on the evidence before the trial court. Kentucky law requires a trial court to give instructions on the whole law of the case. Cooper, Kentucky Instructions to Juries, Vol. 1, Section 1.05A, p. 14 (1999). Where there is a question of fact regarding the defendant's actions, that issue must be placed before the jury in the jury instructions. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). The question of whether a defendant acted with extreme indifference is a jury issue, and must be presented to the jury for ruling. Hudson v. Commonwealth, Ky., 979 S.W.2d 196, 198 (1998). Instructions

that provide the jury with sentencing options including wanton or reckless behavior are considered proper. Robertson v. Commonwealth, Ky., 82 S.W.3d 832 (2002). We find the trial court's instructions appropriate under the evidence before the court.

Burkhead asserts that the trial court improperly permitted introduction of motive evidence in rebuttal, without the required notice to the defendant. The Commonwealth attempted to present evidence at trial showing a prior altercation over drugs between Schildknechk and Burkhead. Burkhead objected, noting that he had no prior notice of the fight. The court instructed the prosecution that such a matter was a prior criminal act for which notice to the defense is required.

Notice is required in order to "provide the accused with an opportunity to challenge the admissibility of this evidence. . . ." Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 31 (1998). Burkhead argues that this evidence was substantive, and the attempt to introduce it on rebuttal constitutes reversible error. The trial court permitted the introduction of the evidence, which the Commonwealth claimed it had just discovered, and permitted Burkhead to cross-examine Schildknechk regarding the alleged fight. Evidence regarding the relationship between the defendant and the victim is relevant and admissible. Lear

v. Commonwealth, Ky., 884 S.W.2d 657 (1994). There was no showing that the Commonwealth intentionally delayed admission of the evidence. Under such circumstances, we do not find reversible error.

Burkhead claims that reversible error occurred when the trial court denied his request to show a videotape of the accident scene. Burkhead argues that this videotape was necessary to show the sharpness of the turn, and to support his contention that the vehicle was traveling slowly at the time Schildknechk was hit. Burkhead asserts that the trial court's denial was an abuse of discretion. Rulings on admissibility of evidence shall not be disturbed absent a showing of an abuse of discretion. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). There was no showing that it was an abuse of discretion to deny Burkhead the right to show the videotape. Photographs of the accident scene and descriptions of the scene were allowed into evidence. Under such circumstances, the trial court's denial did not constitute reversible error.

Burkhead asserts that he was denied the right to confront the witness when the trial court denied his request to ask Schildknechk how much contraband he had ingested in the days prior to the accident. Burkhead claims he was attempting to show that Schildknechk was too "high" at the time of the crash to know what was going on. The trial court permitted initial

questions regarding drug use, but excluded the remainder as irrelevant. Under Kentucky law the trial court may control the mode and order of questioning witnesses. KRE 611. The trial court may limit cross-examination, within its discretion. Baze v. Commonwealth, Ky., 965 S.W.2d 817 (1997). We affirm the trial court's ruling.

Burkhead claims that the trial court was in error when it excluded evidence that Burkhead was remorseful after the crash. Burkhead's written statement showing remorse was read to the jury. The audiotape of his verbal statement was also played to the jury. In those statements, Burkhead expressed the fact that he did not mean to hit the victim, and that he was sorry for his actions. The trial court merely refused to allow Burkhead to ask the investigating officer how he would characterize Burkhead's feelings. This was a permissible limitation on the admissibility of evidence.

Lastly, Burkhead asserts that he was improperly precluded from asking on voir dire whether people could be killed accidentally in a traffic accident. Burkhead claims that the trial court's actions were improper, because he was not allowed to determine whether the jurors could consider the entire range of penalties, as required by Shields v. Commonwealth, Ky., 812 S.W.2d 152 (1991). We find no connection in the record between the proposed voir dire and the issue of

whether the jury could properly consider the entire range of penalties. The proposed question appears to be a matter of general knowledge. Even where the denial of such a question is in error, there was no showing that the claimed error affected the outcome of the case. Under such circumstances, the claim does not rise to the level of reversible error. Horton v. Commonwealth, Ky., 240 S.W.2d 612, 614 (1951).

For the foregoing reasons, we affirm Burkhead's conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

David T. Eucker
Frankfort, Kentucky

BRIEF FOR APPELLEE:

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

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky