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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002315-MR

CARLTON TODD GALLMAN

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 02-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of first-degree fleeing or evading and being a first-degree persistent felony offender ("PFO I"). Appellant argues that his conduct did not create a substantial risk of serious physical injury, that the prosecutor made an improper statement during closing argument, and that appellant was improperly asked

on cross-examination to comment on the credibility of another witness. Upon review of the record, we adjudge either there was no error committed or if there was error, it was harmless.

Hence, we affirm.

Shortly after midnight on February 11, 2002, Trooper Greg Virgin pulled in behind a 1986 Ford Mustang traveling about 45 miles per hour in a 35 mile-per-hour zone on a rainy night in a residential area. After Trooper Virgin fell in behind the car, it began to increase speed to about 50 miles per hour. When the vehicle turned, Trooper Virgin activated his blue lights, and the car then sped up to about 55 miles per hour. As Trooper Virgin continued behind the car with his blue lights on, the car did not stop. Instead the driver crossed some railroad tracks and turned again, this time onto a winding road with a speed limit of 25 miles per hour. According to Trooper Virgin, the car then, while traveling at about 45 or 50 miles per hour, "flew" through a stop sign and made a quick left turn. At this point, other police were called as backup to pursue the vehicle. With Trooper Virgin continuing to give chase, the car "blew" through another stop sign at a three-way intersection and thereafter crashed into a ditch. Trooper Virgin testified that the driver of the car immediately got out of the car and began running away. Trooper Virgin then began chasing the driver on foot.

As Trooper Virgin ran after the driver, he suddenly felt a sharp pain in his left upper thigh and fell to the ground, no longer able to chase the man. A second police officer, Deputy Howard, arrived on the scene and witnessed the car plow into the ditch and Trooper Virgin falling to the ground in his attempt to catch the fleeing driver. The driver ultimately got away.

After the crash, the police discovered that two passengers had been in the car during the chase. Roger Wilson was found in the back floor of the car and later taken to the hospital for a head injury, although there was no evidence adduced at trial regarding the seriousness of that injury. A second passenger, Richard Grubb, was apprehended by Deputy Howard at the scene.

On March 9, 2002, appellant, Carlton Gallman, was arrested and charged with first-degree fleeing or evading police and PFO I. Gallman thereafter gave a statement admitting he was the driver of the car on the night in question. Pursuant to a jury trial, Gallman was convicted of both charged offenses and sentenced to ten years' imprisonment. This appeal followed.

Gallman's first argument is that the Commonwealth failed to present evidence that his conduct caused serious physical injury to any person. KRS 520.095 provides in pertinent part:

(1) A person is guilty of fleeing or evading police in the first degree:

(a) When, 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, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:

. . .

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

(b) When, as a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys an order to stop, given by a person recognized to be a peace officer, and at least one (1) of the following conditions exists:

. . .

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

Gallman makes much of the fact that the evidence did not establish that Trooper Virgin sustained a serious physical injury and, in any event, there was no evidence that Gallman's conduct was the cause of that injury. The language section (a)4. of the statute requires that the defendant "is the cause, or creates a substantial risk of serious physical injury or death to any person . . ." (emphasis added.) Thus, the Commonwealth is not required to prove that Gallman actually

caused serious physical injury; it need only prove that Gallman's conduct created a substantial risk of serious physical injury. From our view of the evidence, we need not adjudicate whether the risk of serious physical injury was proven relative to Trooper Virgin. Rather, we believe the risk of serious physical injury was clearly established relative to the two passengers in Gallman's car. While there was no evidence of the severity of the actual head injury to passenger Wilson, Gallman's crashing the car into an embankment at 45 or 50 miles per hour was certainly evidence that he created a substantial risk of serious physical injury to his two passengers.

Gallman's next argument is that the prosecution improperly told the jury during closing argument that it should send a message with its verdict. The allegedly improper statement was as follows:

And the convicted felon said, no (sic) it was some other way; and I would suggest to you that he needs to be found guilty not of the second degree, that's telling the wrong message to the policeman and the community at large - not a second degree. You have to send a message that if you get in a police chase, run stop signs and you drive fifty-five miles per hour through [a] residential area and you send people to the hospital that that's first degree fleeing.

It is undisputed that this issue was not preserved for appellate review by an objection to the statement.

Nevertheless, Gallman urges us to review the alleged error under

the palpable error rule - RCr 10.26. Under RCr 10.26, if upon consideration of the whole case, there is not a substantial possibility that the result would be different absent the error, there is no manifest injustice to the defendant. Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830 (2003).

In Young v. Commonwealth, Ky., 25 S.W.3d 66 (2000), the prosecution told the jury during closing argument in the sentencing phase of a drug case that they needed to "send a message to drug dealers" to counter the defendant's argument that the jury should recommend the minimum sentence. The Court held that because the prosecution's comments were reasonably supported by the record and because the jury is not the ultimate sentencing authority under KRS 532.060, any error was not palpable.

Similarly, in the present case, the Commonwealth's assertions that Gallman was driving 55 miles per hour in a residential area, ran through stop signs and caused people to be sent to the hospital were supported by the record. Moreover, given the considerable evidence that Gallman was guilty of first-degree fleeing and evading, we cannot say that the error was palpable. In our view, even in the absence of the prosecution's questionable remarks, the jury would still have convicted Gallman of first-degree fleeing and evading. Hence, Gallman is not entitled to RCr 10.26 relief.

Gallman's remaining argument is that he was denied a fair trial and due process when the trial court overruled an objection to the following line of questioning by the Commonwealth in its cross-examination of Gallman:

Q So you are walking right into his headlights and you say he pulled a gun on you?

A Yes, sir.

Q You heard Trooper Virgin say he didn't do that?

A I think he did. He had something.

Q He is a seventeen-year veteran of Post Fourteen, and you are a convicted felon, is that correct?

DEFENSE Object.

THE COURT Overruled.

A Yes, sir.

Q So basically the situation we've got is you're a convicted felon saying one thing and a seventeen-year veteran of the police department says another thing and you think they ought to believe you?

Gallman claims the above questioning improperly and prejudicially overemphasized the fact that he was a convicted felon and further required Gallman to comment on the credibility of another witness, Trooper Virgin. We would note that Gallman objected only to the prosecution's asking if he was a convicted felon and if Trooper Virgin was a veteran of the police force.

RCr 9.22. Under KRE 609(a), it is permissible to impeach a witness by eliciting from the witness the fact that he has been previously convicted of a felony. Nor was there anything improper about the prosecution asking Gallman if he was aware that Trooper Virgin was a veteran of the police force, which was true. The prosecution was clearly not attempting to have Gallman comment on Trooper Virgin's credibility. Rather, it was simply attempting to demonstrate who was the more credible witness. In our view, any error resulting from the Commonwealth's second reference to Gallman's prior felony conviction was harmless. RCr 9.24.

For the reasons stated above, the judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

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