

RENDERED: JANUARY 6, 2006, 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002290-MR

BRYAN CLAYTON WELLS

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
INDICTMENT NO. 01-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

KNOPF, JUDGE: On September 7, 2001, a Scott County grand jury returned an indictment charging Brian Clayton Wells with two counts of assault in the third degree;¹ and one count each of resisting arrest;² first degree escape;³ and being a persistent

¹ KRS 508.025; a class D felony.

² KRS 520.090; a class A misdemeanor.

³ KRS 520.020; a class C felony.

felony offender in the second degree.⁴ Following a trial, the jury acquitted Wells on the assault charges, but found him guilty of the remaining charges. The jury fixed Wells's sentence at a total of ten years' imprisonment, which the trial court imposed. Wells now appeals. Finding no error, we affirm.

The charges arose from separate incidents which occurred on July 7 and 8, 2001. On July 7, two Scott County deputy sheriffs, Phillip Karrick and Buster Cannon, went to Wells's residence to serve an arrest warrant on him. As Deputy Karrick was attempting to handcuff him, Wells pulled away and fled the scene.

The following day, July 8, Deputy Lane Crawley learned that Wells and Brittany Crawley, Deputy Crawley's daughter, were at Deputy Crawley's sister's house. Apparently, Deputy Crawley and Wells had an ongoing dispute concerning Wells's relationship with Brittany. After entering the house with the consent of the owner, Deputy Crawley found Wells hiding in a closet. Wells fought with Deputy Crawley and several other officers until they could subdue him, and Wells continued to struggle even after being restrained.

Wells first argues that the trial court erred by denying his motion for a directed verdict on the escape charge.

⁴ KRS 532.080(2).

A person is guilty of first degree escape when "he escapes from custody or a detention facility by use of force or threat of force against another person."⁵ Custody means "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes"⁶ Wells insists that there was no evidence that he was under arrest, or under restraint pursuant to a lawful arrest at the time he fled from Deputies Karrick and Cannon. He asserts that the officers had not actually placed him under arrest, but were merely "attempting" so do so when he broke loose.

However, both officers testified that they informed Wells that they had an arrest warrant for him and that they were placing him under arrest.⁷ The officers' subsequent inability to handcuff Wells does not negate the evidence that they had already restrained Wells pursuant to a lawful arrest. Consequently, there was sufficient evidence to present the escape charge to the jury.⁸

Wells next argues that the trial court improperly limited Brittany Crawley's opinion testimony regarding the

⁵ KRS 520.020(1).

⁶ KRS 520.010(2).

⁷ Trial Transcript, V. 1 p. 109; V. 2, p. 260.

⁸ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

altercation between Wells, Deputy Crawley, and the other officers. While Brittany Crawley was testifying about the July 8 incident, she stated that "I was kind of actually fearful of what was going to happen to Bryan." Defense counsel then asked, "Why did you think that something might happen to Bryan?"⁹ At that point, the Commonwealth objected, arguing that the question called for hearsay and for her opinion about the threat which Wells perceived from the officers. The trial court sustained the objection and defense counsel pursued a different line of inquiry.

Wells contends that Brittany's testimony was admissible as a lay opinion under KRE 701, and that the trial court erred by excluding her testimony. The Commonwealth responds that Wells failed to make an offer of proof that would have demonstrated the relevance of Brittany Crawley's testimony. Unless the relevancy of the excluded testimony is apparent from the questioning, the failure to present the evidence by avowal precludes appellate review of the evidentiary ruling.¹⁰ Because the objection was not properly preserved and the relevancy of

⁹ Trial Transcript, V. 3. p. 363.

¹⁰ Commonwealth v. Ferrell, 17 S.W.3d 520, 523-24 (Ky. 2000); citing KRE 103, and Partin v. Commonwealth, 918 S.W.2d 219, 223 (1996).

the question is not clear, we decline to review this issue further.

Accordingly, the judgment of conviction by the Scott Circuit Court is affirmed.

ALL CONCUR.

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