RENDERED: JANUARY 13, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001966-MR

RICHARD LUNSFORD — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CR-00228

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.[1]

BUCKINGHAM, JUDGE: Richard Lunsford appeals from a judgment of the Jessamine Circuit Court wherein he was convicted of four counts of first-degree wanton endangerment and sentenced to ten years in prison. Lunsford raises three arguments and contends that a resolution of any of them in his favor should result in

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

his being granted a new trial. Having reviewed the matter, we affirm.

Beginning in 1989, Lunsford and Christina Charles met and began a relationship. At that time, Christina had a son, Dakota Charles, from a previous relationship. Lunsford and Christina never married, but they lived together for several years. In 1996, they had a daughter, Savannah Charles.

Later in the relationship, Lunsford, Christina, and the children moved to Estill County to live with Lunsford's parents. Their relationship began to deteriorate in early 2001. On April 27, 2001, Christina left, taking Savannah and Dakota with her. She moved to Jessamine County where she and the children lived with her cousin, George Harris, and his daughter, Chastity. Lunsford testified at trial that he was unaware of where Christina and the children had moved and that Christina "stole my kids."

On June 19, 2003, Christina drove her 1993 Nissan Sentra to Wal-Mart for grocery shopping. Savannah, Dakota, and Chastity were with her. On her way home, Lunsford and Christina met on the highway traveling in opposite directions. They recognized each other, and Lunsford quickly turned his truck around and overtook Christina's vehicle. He then pulled in front of the vehicle and blocked its path, forcing it to stop in the middle of the road.

Lunsford then got out of his truck with a pistol in his hand. When it became apparent to Lunsford that Christina had no desire to communicate with him, he hit the window with the barrel of his pistol. Christina then told the children to get down and to lock the doors, and she began to back down the road. At that point, Lunsford fired his pistol at the car, shooting out one of the front tires. While Christina testified that to the best of her recollection Lunsford fired two or three times, Lunsford maintained that he fired only once. He testified that he was not trying to hurt anyone and that he was only trying to stop the car. Dakota testified that he heard three or four shots. Savannah and Chastity did not testify.

Although the tire was quickly losing air, Christina was able to get her car turned around and headed back toward town. Lunsford got back into his truck and followed her, eventually pulling his truck along side her car. At one point, the two vehicles bumped, knocking off the side mirror on Christina's car and forcing her to stop. Christina eventually made it into town after Lunsford backed off and declined to continue following her.

A Jessamine County grand jury indicted Lunsford on four counts of first-degree wanton endangerment in connection with shooting his pistol at the car occupied by Christina and the three children. A jury heard the case, found Lunsford

guilty on all four counts, and recommended a sentence of two and one-half years on each count, to run consecutively for a total of ten years. In accordance with the jury's recommendation, the circuit court sentenced Lunsford to ten years in prison. The final judgment was entered on September 13, 2004, and this appeal by Lunsford followed.

Lunsford's first argument is that the trial court erred in allowing the Commonwealth to introduce a repair estimate into evidence because the document constituted inadmissible hearsay. During the Commonwealth's presentation of its case, it sought to introduce an auto body repair estimate to prove that Christina's car had been damaged. After Lunsford's attorney objected to the evidence, the court overruled the objection and allowed the estimate to be introduced. The court reasoned that the Commonwealth could introduce the evidence to prove that the vehicle had been damaged and that the incident did occur. The court further reasoned that the estimate was not hearsay because it was not offered for the truth of the matter asserted. Further, the court did not allow the dollar amount on the estimate to be disclosed to the jury.

Lunsford contends that the court erred in that the repair estimate was hearsay and was not evidence admitted for a nonhearsay purpose. Further, Lunsford argues that the repair estimate improperly increased the jury's sympathy for Christina

by bringing to its attention that Christina incurred damages to her car that she did not cause. Further, Lunsford asserts that the repair estimate was not relevant because it did not prove any fact in connection with Lunsford's shooting the tire.

Regardless of whether or not the repair estimate was properly admitted into evidence for a nonhearsay purpose, we fail to see its relevance. Both parties acknowledged that their vehicles collided, although Lunsford said Christina swerved toward him and Christina said Lunsford swerved toward her. Nevertheless, we conclude that any error concerning the admissibility of the repair estimate into evidence was harmless.

RCr[2] 9.24 states as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

We fail to see how the jury's knowledge of the repair estimate affected the substantial rights of Lunsford to a fair trial. Although the court allowed the document into evidence as proof

[2] Kentucky Rules of Criminal Procedure.

that Christina's car had been damaged, the jury was already aware of the fact that the two vehicles collided. In that regard, the evidence was merely cumulative. See KRE[3] 403. In short, we conclude that Lunsford suffered no prejudice by the admission of the estimate into evidence and that any error in this regard was harmless.

Lunsford's second argument is that the court erred by not allowing a prior inconsistent statement made by Christina to be admitted into evidence. At trial, Christina testified that Lunsford fired two or three shots. During cross-examination by Lunsford's attorney, she was asked whether she had testified in a preliminary hearing that Lunsford had fired only one shot. In response, Christina stated that she would not disagree with counsel that she had stated there had been only one shot fired and that she had not been counting the shots.

At the close of Lunsford's evidence at trial, his attorney sought to introduce as substantive evidence the audiotape from the preliminary hearing where Christina apparently testified that Lunsford fired only a single shot. See KRE 801A(a)(1). A bench conference was held, and we are unable to determine why the court did not allow the tape into evidence. Nevertheless, the motion to admit the tape was apparently denied.

[3] Kentucky Rules of Evidence.

Again, we conclude that any error in this regard was harmless. See RCr 9.24. When Christina was asked about whether she had testified at the preliminary hearing that Lunsford had only fired a single shot, she did not deny it. She stated that she would not disagree with Lunsford's attorney that her testimony had been to that effect. Furthermore, Lunsford was only charged in connection with the single shot that hit the tire, and he admitted he fired that shot. There were no charges in connection with any additional shots that Lunsford may have fired. For these reasons, we conclude that Lunsford could not have suffered prejudice and that any error by the court in not allowing the tape to be admitted into evidence was harmless.

Lunsford's third argument is that the court erred by allowing the Commonwealth to improperly impeach him with a prior misdemeanor conviction. He maintains that the Commonwealth's injection of the prior misdemeanor conviction into evidence was in violation of KRE 404 and KRE 609. We disagree.

During direct examination by his attorney, Lunsford stated that "I've never done anything to be harmful to any of them before; there was no reason for her to be against me so bad, other than the fact that she just didn't want me to have my kids." On cross-examination, the Commonwealth was allowed to question Lunsford concerning emergency protective orders obtained by Christina against him and the fact that he had been

found guilty of violating such orders on five separate occasions. The court allowed the Commonwealth to inquire into these matters on the grounds that Lunsford had "opened the door."

The Kentucky Supreme Court observed in Smith v. Commonwealth, 904 S.W.2d 220 (Ky. 1995), that "one who opens the book on a subject is not in a position to complain when his adversary seeks to read other verses from the same chapter and page." Id. at 222. While the Commonwealth ordinarily could not have injected this matter into the trial, it was allowed to do so because Lunsford opened the door and brought the matter in himself. When Lunsford asserted that he had never done anything harmful to either Christina or the children and that she just did not want him to have the children, he opened the door for the Commonwealth to impeach his testimony with the EPOs and his violations of them. Furthermore, as these facts did not amount to impeachment on a collateral matter, they were admissible into evidence.

For the reasons set forth above, we affirm the judgment of the Jessamine Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel N. Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky