

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002408-MR

KEESAN T. HUDSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
CIVIL ACTION NO. 01-CR-00271

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MINTON, JUDGE: Keesan T. Hudson appeals his convictions for attempted rape, fleeing or evading police officers, burglary, and being a persistent felony offender in the first degree (PFO I). Finding no error, we affirm.

In response to a 911 call, officers were dispatched to investigate an attempted rape. When he saw Hudson walking down

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS (Kentucky Revised Statutes) 21.580.

the street, Officer Brian Graham thought he matched the description of the suspect. So he stopped his patrol car and ordered Hudson to identify himself and to put his hands on the car. After Graham repeated his order, Hudson muttered an obscenity and took off running. Graham, along with another citizen, gave chase.

In response to Graham's call for backup assistance, Sergeant William Bland drove to assist Graham. During the chase, Bland drove his police cruiser "pretty close" to Graham. Eventually, Hudson was arrested and was later indicted for burglary in the second degree, two counts of attempted rape in the first degree, fleeing or evading police in the first degree, and being a PFO I. The fleeing or evading count inexplicably stated that Hudson had created a substantial risk of death or serious physical injury by exiting Graham's police cruiser while it was in motion. Hudson entered a plea of not guilty, and the case progressed to a jury trial.

At trial, over Hudson's objection, the trial court granted the Commonwealth's motion to amend the indictment to reflect that Hudson committed the fleeing or evading offense by leading Graham on a foot chase that brought him near to the path of Sergeant Bland's moving vehicle.

Hudson testified in his own defense. During cross-examination, the Commonwealth attempted to ask him whether he

had been convicted of two prior felonies. The trial court sustained Hudson's objection to the question and admonished the jury to disregard it but denied Hudson's motion for a mistrial.

The jury found Hudson guilty of all the charges in the indictment; and he was sentenced to enhanced sentences as a PFO I of fifteen years on each attempted rape charge, ten years for the burglary charge, and one year for the fleeing or evading police charge, all of which were ordered to run concurrently. Hudson then filed this appeal.

Hudson raises no direct challenges to his attempted rape, burglary, or PFO I convictions. Rather, he raises the following three allegations of error: first, that the trial court erred by allowing the Commonwealth to amend the fleeing or evading count of the indictment during trial; second, that the trial court erred by not directing a verdict on the fleeing or evading charge; and, third, that the trial court erred by not declaring a mistrial when the Commonwealth mentioned the two prior felony convictions.

RCr² 6.16 provides that an indictment may be "amended any time before [the rendering of the] verdict or finding if no additional or different offense is charged and if [the] substantial rights of the defendant are not prejudiced." Here, the amendment only served to change the method by which Hudson

² Kentucky Rules of Criminal Procedure.

allegedly committed the crime of fleeing or evading the police. So no new offense was charged. And the question before us is whether the amendment prejudiced Hudson's substantial rights.

The decision of whether to permit the Commonwealth to amend an indictment at trial is a matter within the trial court's discretion.³ In the case at hand, the trial court noted, without objection, that everyone knew the original indictment's allegation that Hudson jumped from Graham's moving vehicle was incorrect and that the amendment was made merely to conform the indictment to the evidence. Thus, Hudson's argument that the amendment introduced an impermissible "new theory" into the case is a fallacy. Because Hudson knew the language of the original indictment was incorrect, the proof required to prove the amended charge should have been very familiar to him, meaning that he was not taken by surprise.⁴ In short, Hudson's conclusory argument is simply insufficient for us to conclude that the trial court erred by permitting the indictment, which

³ Baker v. Commonwealth, 103 S.W.3d 90, 94 (Ky. 2003) ("However, the trial court had the discretion to amend the indictment in this case pursuant to RCr 6.16.").

⁴ Robards v. Commonwealth, 419 S.W.2d 570, 573 (Ky. 1967) (holding that it would not have been improper to amend an indictment because a defendant "was not misled, surprised or thrown off guard except insofar as he chose to shoot the gap in reliance upon a mere technical defect of which he was fully aware.").

was known to be inaccurate, to be amended to conform to the evidence.⁵

KRS 520.095(1)(b) provides that a person commits the offense of fleeing or evading the police in the first degree 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 . . . [b]y 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." Serious physical injury is defined as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ."⁶

In the case at hand, it is uncontested that Hudson disobeyed Graham's order to stop and, in fact, ran from Graham. But Hudson argues that he was entitled to a directed verdict on this charge because the Commonwealth failed to prove that Graham was subjected to a substantial risk of serious physical injury or death. We disagree.

⁵ See, e.g., Schambon v. Commonwealth, 821 S.W.2d 804, 810 (Ky. 1991) (affirming trial court's decision to permit an indictment to be amended because "[t]he [amended] offense was the same. No additional evidence was required to prove the amended offense and appellants have not shown that they were prejudiced by the amendment. There was no error.").

⁶ KRS 500.080(15).

The familiar standard for ruling on a motion for directed verdict is as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.⁷

The question of whether a suspect's flight creates a substantial risk of death or serious physical injury, obviously, is highly dependent on the particular facts of a case; but our Supreme Court has indicated that a risk must be "ample" or "considerable" in order to rise to the level of being a "substantial risk."⁸ A jury, or reviewing court, may, however, draw all reasonable inferences from the evidence in the course

⁷ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

⁸ Bell v. Commonwealth, 122 S.W.3d 490, 497 (Ky. 2003) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)).

of determining whether a substantial risk of serious physical injury is present.⁹

In this case, it was dark when Hudson fled from Graham through the streets of the City of Elizabethtown. It was entirely foreseeable that pedestrians running through the streets after dark would come into close contact with moving vehicles, thereby greatly endangering pedestrians and motorists, which is precisely what happened to Graham. We believe that the jury could have reasonably inferred that Hudson's flight on foot caused Graham nearly to be struck by a moving vehicle, which, in turn, placed Graham in a substantial risk of serious physical injury or death.¹⁰

Finally, we reject Hudson's argument that this case is factually indistinguishable from Bell v. Commonwealth. In Bell, the subject dropped a handgun during his flight from the police. In that case, any substantial risk of serious physical injury was entirely speculative because the fleeing suspect never drew his weapon or pointed it at the officer. In the case at hand, the evidence was that Graham was nearly struck by Bland's vehicle, meaning that the substantial risk of serious physical

⁹ *Id.*

¹⁰ Although we would have preferred to know exactly how close Graham came to being struck by Bland's vehicle, we believe Graham's testimony was specific enough for the jury to reasonably infer that Bland's vehicle came close enough to him to place him in substantial danger of serious physical injury or death.

injury was concrete, not speculative. Indeed, this case would have been similar to Bell only if the chase had not produced an actual near-collision between Graham and a moving vehicle, thereby making the risk of serious physical injury entirely speculative and hypothetical.

In short, we find that a reasonable juror could have found that Hudson's flight created the situation that placed Graham in substantial risk of serious physical injury or death from Bland's moving vehicle. Thus, the trial court correctly denied Hudson's motion for a directed verdict on the fleeing or evading charge.

During cross-examination of Hudson, the Commonwealth stated to Hudson, presumably as a preface to a question, "[f]irst, you've been convicted of not one, but two felonies in the past." Before the full question was posed and before Hudson responded, his counsel objected and immediately moved for a mistrial. The trial court denied the motion for a mistrial but admonished the jury to disregard the "question." Hudson argues before us that the trial court erred by denying his motion for a mistrial.

The Commonwealth is permitted to impeach a witness by asking if the witness has been previously convicted of a

felony.¹¹ But unless the witness denies having any such prior conviction, the Commonwealth may not question the defendant as to the nature and/or number of any previous felony convictions.¹² Thus, the Commonwealth's question injected error into the trial proceeding. Nevertheless, such an error is harmless unless "there is no reasonable possibility that, absent the error, the verdict would have been different."¹³ Similarly, a trial court should grant a mistrial only if the record reveals a "manifest necessity" for such extreme, drastic action.¹⁴

We believe that the error was harmless in this case. It is unquestioned that Hudson was, in fact, a convicted felon. But more importantly, the trial court acted quickly to admonish the jury to disregard the question. Juries are presumed to follow such admonitions; and those admonitions are presumed to

¹¹ KRE (Kentucky Rules of Evidence) 609; Commonwealth v. Richardson, 674 S.W.2d 515, 517-518 (Ky. 1984).

¹² Hodge v. Commonwealth, 17 S.W.3d 824, 848 (Ky. 2000) ("Pursuant to Richardson, an interrogator can impeach a witness with all prior felony convictions only if the witness first denies having been convicted of any prior felonies. Since Gentry did not deny being a convicted felon, it was error to permit the Commonwealth's attorney to question her as to the number and nature of all of her prior felony convictions.").

¹³ *Id.* See also RCr 9.24.

¹⁴ Major v. Commonwealth, 177 S.W.3d 700, 709 (Ky. 2005).

cure any errors, with only two exceptions, which, contrary to Hudson's arguments, do not apply to the facts of this case.¹⁵

First, contrary to Hudson's arguments, there was no "overwhelming probability" that the jury was unable to follow the trial court's admonition to disregard the question. Hudson's argument is not supported by any citation to the record or to a factually similar case. So his argument is pure conjecture and speculation, which are insufficient to overcome the presumption that admonitions have a curative effect.¹⁶

Second, the question at issue clearly had a basis in fact and was not highly prejudicial in light of Hudson's later admission that he was a convicted felon.¹⁷ In short, the trial

¹⁵ Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) ("A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error. There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis *and* was 'inflammatory' or 'highly prejudicial.'") (Internal citations omitted).

¹⁶ Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky.App. 1993) ("In the absence of evidence to the contrary, we must assume that the admonition achieved the desired effect.").

¹⁷ Hudson answered affirmatively when the Commonwealth later asked him if he was a convicted felon. Furthermore, Hudson later volunteered that he was a convicted felon who had done "silly things in the past." Indeed, the Commonwealth later introduced certified copies of final judgments showing that Hudson had been convicted of two prior felonies.

court did not abuse its discretion when it denied Hudson's motion for a mistrial.¹⁸

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Euva D. May
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky

¹⁸ Clay, 867 S.W.2d at 204 ("A trial court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion.").