

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000989-MR

RICHARD BUTCHER

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 05-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Richard Butcher pled guilty to two counts of receiving stolen property over \$300, one count of first-degree fleeing or evading the police, two counts of first-degree wanton endangerment, and to being a second-degree persistent felony offender (PFO). He received a total sentence of seven years' imprisonment. On appeal, Butcher argues that his guilty plea was conditional and that: (1) the trial court erred by failing to sever one count of the receiving stolen property charges from the rest

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of the indictment; (2) the trial court should have excluded evidence pursuant to KRE 404(b); and (3) the convictions for both fleeing or evading and wanton endangerment violate double jeopardy principles. We affirm.

On June 22, 2005, Butcher possessed a blue truck that had been stolen. The next day, Butcher received another stolen truck-this one was red. While investigating the crimes, police observed Butcher driving a red truck which matched the description of one of the stolen vehicles. The officers immediately directed Butcher to pull over, but Butcher failed to do so and a high speed pursuit ensued. The chase involved several officers and occurred in the middle of the afternoon in congested areas of Jessamine County. At one point, Butcher swerved the truck towards two officers who were standing outside their cruisers in an attempt to stop him. Butcher was eventually apprehended and charged with numerous counts relating to the chase as well as two counts of receiving stolen property (one for each truck).

Butcher filed motions seeking to sever the count of receiving the blue truck from the rest of the charges relating to the chase. He also filed a motion to merge the wanton endangerment counts with the fleeing or evading charge. Additionally, Butcher also moved the court to exclude any evidence that the vehicle had been stolen from Lexington Laminates and the identification of Butcher by an employee of that business. The trial court held a hearing and denied the motions. Thereafter, Butcher moved to enter a guilty plea. The plea agreement contained the handwritten notation “conditional Alford” plea. The trial court conducted a plea colloquy in which Butcher's counsel

informed the court that a conditional plea was being entered. Neither the plea agreement nor the colloquy stated any of the issues Butcher wished to appeal.

RCr 8.09 states:

With the approval of the court a defendant may enter a conditional plea, **reserving in writing the right**, on appeal from the judgment, to review of the adverse determination of any **specified** trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal.

(emphasis added). While a conditional plea was noted on the agreement and brought to the attention of the trial court during the colloquy, there is no writing that specifies the issues Butcher wished to appeal. Nor does the record of the colloquy reveal any specific issues reserved, only the general right to appeal. Because the plea agreement was manifestly intended to be conditional and in the interests of judicial economy, we will nevertheless review these issues on the merits.

First, Butcher argues that the the trial court erred by failing to sever one count of receiving stolen property from the other eleven counts relating to the high speed chase. As mentioned previously, the count Butcher wished to sever charged him with receiving a stolen blue truck the day before the high speed chase incident.

RCr 9.16 states in pertinent part:

If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses . . . the court shall order separate trials of counts . . . or provide whatever other relief justice requires.

The decision to sever is committed to the sound discretion of the trial court. *Roark v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002). The issue is whether the defendant would

be unduly prejudiced. *Id.* Undue prejudice is that which is “unnecessary and unreasonable.” *Id.* “The primary test for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other.” *Id.* In this case, the crimes were similar in nature and involved similar circumstances. The crimes were committed only one day apart. Additionally, the crimes involved had two witnesses in common. There was no abuse of discretion in failing to sever the counts.

Next, Butcher argues that the trial court erred by allowing evidence of his criminal activities in Fayette County in violation of KRE 404(b). KRE 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;
or
- (2) If so inextricably entwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

There is a three-part test to determine the admissibility of evidence under KRE 404(b):

(1) the evidence must be relevant for some other purpose than to prove the criminal predisposition of the defendant; (2) the proof of the prior crimes must be sufficiently probative to warrant its introduction into evidence; and (3) the probative value of the evidence outweighs the potential for undue prejudice. *Daniel v. Commonwealth*, 905

S.W.2d 76, 78 (Ky. 1995). The admissibility of evidence is reviewed under the abuse of discretion standard. *Id.*

Prior to trial, the Commonwealth gave notice pursuant to KRE 404(c) that it intended to introduce evidence that the truck recovered was stolen from a business called Lexington Laminates, that Butcher had been identified, and that he was seen driving another stolen vehicle. The Commonwealth stated that the evidence would be offered to show opportunity, identity, and knowledge that the vehicle was stolen. This evidence was certainly relevant and supported by eyewitness identification. These prior acts was also in close proximity of time to the charged crimes. The trial court did not abuse its discretion in allowing this evidence.

Finally, Butcher argues that the convictions for both fleeing or evading the police and wanton endangerment violate double jeopardy principles. Kentucky follows the *Blockburger* rule “as the sole basis for determining whether multiple convictions arising out of a single course of conduct constitutes double jeopardy.” *Taylor v. Commonwealth*, 995 S.W.2d 355, 358 (Ky. 1999).

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

KRS 520.095 defines fleeing or evading police in the first degree in part as follows:

- (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:
 3. The person is driving while his or hers driver's license is suspended for violating KRS 189A.010.

Wanton endangerment in the first degree is defined in KRS 508.060 as follows:

A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

Clearly, these offenses each require proof of an additional element which the other does not. Fleeing or evading the police requires proof that the defendant disobeyed a direction to stop a motor vehicle by a recognized police officer along with an additional factor, in this case, driving upon a license suspended for DUI. Wanton endangerment requires proof that the defendant manifested an extreme indifference to the value of human life by wantonly engaging in conduct that creates a substantial risk of death or injury to another person. The offense of fleeing or evading the police was completed when Butcher first failed to stop when directed by the officers. The wanton endangerment occurred during the high speed chase whereby Butcher almost struck two officers when he swerved his car towards them as they attempted to apprehend him. There was no double jeopardy violation.

Accordingly, the judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

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