

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001591-MR

ROBERT G. WATTS

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 06-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Robert G. Watts appeals from the Perry Circuit Court's judgment sentencing him to ten years' imprisonment after a jury found him guilty of second-degree arson. Watts argues that the trial court erred by failing to direct a verdict in his favor, by admitting certain video evidence, and in its instructions to the jury. For the following reasons, we affirm.

I. Directed Verdict

Watts argues that the trial court erred by failing to direct a verdict in his favor on the charge of second-degree arson, since the Commonwealth did not prove the requisite intent for the commission of that offense. We disagree.

When ruling on a criminal defendant's motion for a 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.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appeal, a defendant is entitled to a directed verdict of acquittal “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]” *Id.*

Obviously, the Commonwealth has the burden of proving every element of an offense beyond a reasonable doubt. KRS¹ 500.070(1). Pursuant to KRS 513.030(1), one is guilty of second-degree arson “when he starts a fire or causes an explosion with intent to destroy or damage a building[.]”² The commentary to the arson statutes explains that to be guilty of second-degree arson, one must perform an “*intentional act* of starting a fire or causing an explosion” and further intend to damage a building. KRS 513.020

¹ Kentucky Revised Statutes.

² A “building” includes, inter alia, an automobile or truck. KRS 513.010.

cmt. Here, Watts argues that he was entitled to a directed verdict because the Commonwealth did not prove that he intended to start the fire.³

At trial, Watts testified on his own behalf that prior to his arrest on September 10, 2005, he drank an unknown quantity of whiskey and beer, smoked marijuana, and took “a handful” of Lorcet and Xanax. He continued drinking alcohol at a bar until 1:00 a.m., when he left with some individuals he did not know. While in the vehicle with those individuals, an argument and fight ensued, resulting in Watts being threatened with a knife and punched in the nose.

Watts got out of the vehicle and eventually saw a Dodge Durango which he believed belonged to the individuals with whom he had been riding, but which in fact belonged to a person Watts did not know. Nevertheless, according to Watts' testimony, he “set the lighter to the vehicle.” Indeed, Watts states in his appellate brief that the videotapes introduced at trial, taken from thirty-two surveillance cameras in the area,⁴ showed that at one point, shortly after he approached the vehicle, the vehicle's interior burned. Further, an officer testified that a brick or rock had been used to break the vehicle's passenger-side window and that the fire started inside the vehicle.

From this evidence, the jury could have inferred that Watts intended to start the fire as he “set the lighter to” a vehicle he believed belonged to someone whom he had

³ Watts also argues that the Commonwealth did not prove that Watts intended “to create a substantial danger.” However, that is not an element of second-degree arson, and the jury was not instructed on any such element.

⁴ The surveillance cameras belonged to Paul Gordon, who owned the residence at which the vehicle was parked.

just fought. Contrary to Watts' assertion, "intent may be inferred from the act itself or from the circumstances surrounding it." *Talbott v. Commonwealth*, 968 S.W.2d 76, 86 (Ky. 1998). Thus, although the jury was also instructed on intoxication, it was not unreasonable for the jury to find guilt, and the trial court did not err by failing to direct a verdict in Watts' favor.

We are not persuaded that the cases cited in Watts' brief compel a different result.⁵ First, in *Sandstrom v. Montana*, 442 U.S. 510, 512, 99 S.Ct. 2450, 2453, 61 L.Ed.2d 39 (1979), a jury was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts" where intent was an element of the charged criminal offense. The Court held this instruction unconstitutional because it violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. *Id.* at 512, 524, 99 S.Ct. at 2453, 2459. As Watts does not allege and the record does not show that a similar instruction was given here, *Sandstrom* is inapplicable to the matter now before us. Similarly, in *Mullaney v. Wilbur*, 421 U.S. 684, 703-04, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508 (1975), the Court held unconstitutional a Maine law which required a criminal defendant "to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." Again, this case is inapplicable to the matter now before us, as Watts does not argue that the jury instructions here placed any burden

⁵ We note that Watts also cites KRS 218A.1437(2)(a), which instructs that the possession of certain drug products constitutes prima facie evidence of the intent to use the drug products as a precursor to methamphetamine or other controlled substance. This statute simply has no relevance to the arson matter now before us.

of proof on him. Finally, the court in *Penix v. Commonwealth*, 95 S.W.2d 616, 617 (Ky. 1936), held that where the evidence showed only “that Alice Hutchison lost some chickens, and that appellant and his companion were in the neighborhood with some chickens not answering the exact description of those lost by Alice Hutchison[,]” the evidence was insufficient to sustain a guilty verdict. Here, by contrast, Watts testified that he “set the lighter to” a vehicle which he believed belonged to someone whom he had just fought. Further, surveillance videos showed that shortly after Watts approached the vehicle, its interior burned. As such, *Penix* does not compel a different result.

II. Video Evidence

Next, Watts argues that the trial court erred by admitting into evidence nine video clips from surveillance cameras, as the footage was repetitive, irrelevant “to prove a point in controversy,” and more prejudicial than probative under KRE⁶ 403. We disagree.

The record contains no copy of the video clips presented to the jury. Nor are the video clips visible in the video record of the trial. Further, in describing the video clips in his appellate brief, Watts merely states that one clip showed him reaching inside of the Durango and “[b]efore long, the interior of the car was on fire.” As we must assume that the omitted record supports the trial court's decision, *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985), we find no merit in Watts' argument that the trial court erred in admitting the video clips.

⁶ Kentucky Rules of Evidence.

III. Jury Instructions

Watts argues that the trial court incorrectly instructed the jury on the definition of “intentionally,” and further erred by failing to give a “missing evidence” instruction. While he concedes that he did not preserve these arguments, Watts nevertheless contends that they amount to palpable error under RCr⁷ 10.26. We disagree.

In Instruction No. 2, the jury was given several definitions, including a definition for “intentionally” which stated, “A person acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct.” This language is in all material respects copied from the definition of “intentionally” found at KRS 501.020(1).

Watts argues that this instruction permitted the jury to find him guilty of second-degree arson if it found intentional “**either** the result **or** the conduct[.]” However, in addition to the definition of “intentionally” set forth in Instruction No. 2, Instruction No. 3 provided:

You will find the Defendant guilty of Second-Degree Arson under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about September 10, 2005, and before the finding of the Indictment herein, he set fire to a 2001 Dodge Durango owned by Vivian Gordon;
- B. That he started the fire intentionally;
- C. That in so doing, it was his intention to damage or destroy the 2001 Dodge Durango; and

⁷ Kentucky Rules of Criminal Procedure.

D. That Vivian Gordon did not consent to the damage to the 2001 Dodge Durango.

Thus, it is clear that the jury was instructed to find Watts guilty of second-degree arson only if it found that he intentionally started the fire and in so doing intended to cause damage to the vehicle. Accordingly, the trial court did not err in its instruction as to the definition of the word “intentionally,” and Watts is not entitled to relief in order to avoid palpable error.

Next, Watts argues that the court did not give a “missing evidence” instruction,⁸ which is given “to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence[.]” *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). However, due process considerations arise “only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed.” *Id.*

Here, Watts does not contend that he was entitled to a “missing evidence” instruction on the ground that the Commonwealth destroyed any evidence; rather, he contends that he is entitled to such an instruction because the Commonwealth failed to conduct any objective tests to determine whether he was intoxicated at the time of his arrest shortly after the arson. As such, this case is similar to *Collins v. Commonwealth*,

⁸ Cooper's model instruction provides: “If you believe from the evidence that there existed _____ (ID evidence) and that agents or employees of the Commonwealth intentionally destroyed it, you may, but are not required to, infer that the _____ (ID evidence) would be, if available, adverse to the Commonwealth and favorable to the Defendant.” 1 Cooper, *Kentucky Instructions to Juries (Criminal)* § 2.06 (Rev. 4th Ed. 1999). A similar instruction was noted approvingly in *Sanborn v. Commonwealth*, 754 S.W.2d 534, 540 n.3 (Ky. 1988) (overruled on other grounds).

951 S.W.2d 569 (Ky. 1997), wherein the defendant in a rape case argued that his due process rights were violated when the Commonwealth failed to collect and preserve a towel in which the defendant's victim testified that the defendant ejaculated. Noting that the matter was one of first impression because it involved a “missing evidence” situation concerning the Commonwealth's failure to collect evidence rather than the destruction thereof, the court held that the distinction may be one without a difference. *Id.* at 573. Indeed, the court held applicable in both types of cases the standard which requires a defendant to prove bad faith in order to be entitled to a “missing evidence” instruction. *Id.* at 572-73.

Watts argues that the arresting officer acted in bad faith when he failed to perform any objective tests to determine whether Watts was intoxicated, as the officer denied at trial that Watts was intoxicated at the time of his arrest even though he originally had charged Watts with alcohol intoxication and indicated in a contemporaneous arrest report that Watts was “highly intoxicated.” The Commonwealth asserts, and after reviewing the arresting officer's testimony we agree, that the officer did not deny at trial that Watts was intoxicated at the time of his arrest. Instead, the officer testified in essence that he charged Watts with public intoxication because he smelled strongly of alcohol and the officer believed that he was intoxicated. However, Watts was not so intoxicated that he stumbled, slurred his speech, or was unable to communicate with the officer. Further, the officer testified that while he was trained to perform several tests to assess intoxication, he chose not to perform any of those tests on Watts. Again,

he based the public intoxication charge on the fact that Watts “reeked” of alcohol, and his belief that Watts was intoxicated. This evidence is insufficient to support Watts' claim that the arresting officer acted in bad faith when he failed to administer any objective sobriety tests to Watts at the time of his arrest. Consequently, the trial court did not err by failing to give the jury a “missing evidence” instruction, and Watts is not entitled to relief in order to avoid palpable error.

The Perry Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky