

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000123-MR

TONY EICHER

APPELLANT

v. APPEAL FROM SPENCER CIRCUIT COURT  
HONORABLE CHARLES R. HICKMAN, JUDGE  
ACTION NO. 05-CR-00063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,<sup>1</sup> SENIOR JUDGE.

COMBS, CHIEF JUDGE: Tony Eicher appeals his conviction for two counts of first-degree wanton endangerment, Kentucky Revised Statutes (KRS) 508.060; operating a boat under the influence of alcohol, KRS 189A.010; and leaving the scene of an accident, KRS 189.580(1). He claims that the trial court erred in denying his motions for directed verdict and for continuance of his trial. After carefully examining the record, we affirm the Spencer Circuit Court.

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On the evening of July 23, 2005,<sup>2</sup> Bryant Grubb<sup>3</sup> and Mike Johnson met at Taylorsville Lake intending to spend the night fishing for catfish. Grubb was accompanied by his twelve-year-old neighbor, Justin Noe. Soon after dark, both men had positioned their boats in an area of the lake known as “The Hump.” Grubb and Justin searched for bait fish close to the bank while Johnson was closer to the middle of the lake. Both Johnson and Grubb testified at trial that The Hump was quite congested with other fishermen and their boats.

It is undisputed that while Grubb was bait fishing, he heard another boat start up and accelerate. Another boat suddenly struck Grubb’s craft in the back, striking Justin’s shoulder. The impact threw Grubb from the front of the boat to the middle, knocking him unconscious. Johnson observed the collision and realized that his friends were involved when he heard Justin call for help. Johnson illuminated his three-million candle light and maneuvered his boat to the scene of the accident. He clearly observed Tony Eicher in the boat that had crashed into Grubb’s boat.

Eicher asked if Grubb and Justin were all right and offered to tow them to the marina. Johnson observed that Eicher appeared to be too intoxicated to tow a disabled boat and informed him that the authorities had been summoned, directing Eicher to follow him to the marina. Instead, Eicher accelerated the boat to a high speed and headed toward an area of the lake known as Ashes Creek.

Officer Scott Herndon (as he later testified at trial) went to Ashes Creek in a patrol boat where he found Eicher in a highly intoxicated state. Eicher first identified himself with a false name, and Herndon recalled that Eicher smelled of alcohol,

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<sup>2</sup> The briefs recite July 22, 2005, but the ticket and court records reflect July 23.

<sup>3</sup> The briefs refer to Bryant Grubb as “Brian Grubbs.”

demonstrated slurry speech, and staggered. Herndon administered field sobriety tests, which Eicher failed; he also blew above the limit on the breathalyzer test. At that point, Herndon arrested Eicher and placed him in a patrol boat of another officer. Eicher was taken to the marina and was charged with wanton endangerment, operating a boat while intoxicated, leaving the scene of the accident, and resisting arrest.<sup>4</sup> Neither Eicher nor any of the witnesses alleges that Eicher ever denied being the operator of the boat from the time of Johnson's arrival through the arrest process.

However, Eicher's version of the facts implicates his friend (and then employee), Jimmy Tudor, as the driver. Eicher claims that Tudor was driving the boat at the time of the accident but jumped out and left the vicinity right after the collision. Although Tudor admitted to being in the boat that night, he claimed that he was a passenger and jumped out when the boats collided. At trial, Tudor stated under oath that Eicher had offered him \$10,000 and a boat in exchange for his statement that he had been the driver of the boat. Eicher testified that he did not make such an offer. The jury convicted Eicher of two counts of wanton endangerment: operating a boat while under the influence of alcohol and leaving the scene of an accident.

Eicher argues that the trial court erred by denying his motion for directed verdict because the Commonwealth did not prove the elements of each charge.

The standard of review for a motion for directed verdict is set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983):

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<sup>4</sup> Eicher was not convicted of the charge of resisting arrest. The Commonwealth notes that Eicher could have been indicted for assault for the injuries of Grubb and Justin but that he was not so charged.

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.

Pursuant to that standard, we shall examine the elements of the charges against Eicher to determine whether it was reasonable for the jury to convict him.

The elements of wanton endangerment in the first degree are “when, under circumstances manifesting extreme indifference to the value of human life, [a person] wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.” Kentucky Revised Statutes (KRS) 508.060(1). At KRS 501.020(3), the Kentucky penal code defines *wantonly* as pertaining to a person who:

is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by **reason of voluntary intoxication** also acts wantonly with respect thereto. (Emphasis added.)

In construing KRS § 508.060(1), Eicher has offered commentary from the Legislative Research Commission (LRC), which provides that “aimlessly firing a gun in public is not as wanton in degree as firing a gun into an occupied automobile....” He

analogizes his driving a boat while intoxicated to be a similarly aimless act as he was merely adrift in the water rather than aimed at Grubb's boat. However, the witnesses testified that The Hump was quite crowded on the night of the accident. The boats in the area all displayed variously colored front and rear lights, and the congestion was readily apparent.

In a case involving driving under the influence that resulted in a conviction for first-degree wanton endangerment, the Supreme Court of Kentucky provided that in ruling on a motion for directed verdict, the test is "whether a jury could reasonably conclude, viewing the evidence in the light most favorable to the State, that Appellant was driving so wantonly as to manifest extreme indifference to human life." *Ramsey v. Commonwealth*, 157 S.W.3d 194, 197 (Ky. 2005).

In this case, the jury heard evidence that Eicher operated his boat at a high speed in crowded waters. Furthermore, witnesses testified that Eicher's boat repeatedly struck Grubb's boat after the initial impact. The witnesses all noticed Eicher's extreme state of intoxication, which was confirmed by the breathalyzer test administered by Officer Herndon. In addition to placing the occupants of other watercraft at an extreme risk, Eicher's actions also endangered his friend, Jimmy Tudor. There was ample evidence presented to the jury for it to reasonably conclude that Eicher had acted wantonly. Eicher's motion for directed verdict partially relies on his claim that Tudor was driving the boat. However, Tudor testified under oath that he was not driving, and "an appellate court cannot . . . substitute its judgment as to the credibility of a witness for that of the trial court and the jury." *Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky.

1987). We note parenthetically that Eicher was most assuredly driving the boat at high speeds in the crowded water **after** Tudor had bailed out of the boat.

Eicher also argues that the evidence was insufficient to uphold his conviction for leaving the scene of an accident and for failure to render assistance. Once again, we cannot assess the credibility of the witnesses who testified that they informed Eicher that the authorities were at the marina and that he ignored their instructions to follow them. Although he asked Grubb and Justin about their condition and offered to tow them, Eicher was too intoxicated to tow another boat. The evidence was more than sufficient for a reasonable jury to conclude that Eicher left the scene of the accident when he sped away to Ashes Creek.

Eicher next argues that the trial court erred in failing to grant a continuance on the day of the trial. Eicher filed a motion for a continuance because one of his witnesses was unavailable. Kentucky Rule of Criminal Procedure (RCr) 9.04 places the granting of a continuance based on the absence of a witness “in the sound discretion of the trial judge.” Eicher contends that the trial judge did not use sound discretion.

The Supreme Court of Kentucky has held that “the granting of a continuance is in the sound discretion of the trial court and a conviction will not be reversed for failure to grant a continuance unless that discretion has been plainly abused and manifest injustice has resulted.” *Taylor v. Commonwealth*, 545 S.W.2d 76, 77, (Ky. 1976). [citations omitted]; see also *Williams v. Commonwealth*, 644 S.W.2d 335, 336-37 (Ky. 1982). In a later case, the court set forth seven criteria for determining whether a trial court abused its discretion under RCr 9.04:

length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay

is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudices.

*Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

In the case before us, the length of delay is unknown because the motion did not indicate a time frame or a specific date for the continuance. Because the motion was filed on the very day of trial, a continuance would undoubtedly have resulted in significant inconvenience to the court, counsel, jurors, and witnesses who had prepared and appeared. The trial had already been continued twice – once because Jimmy Tudor did not appear and a second time when the court granted the defense time to search for Tudor because he was an indispensable witness. On the day of the actual trial, Tudor appeared and testified. Nonetheless, the defense filed another motion for a continuance due to the absence of a different witness. Eicher’s alleged missing witness was an attorney who purportedly had provided an affidavit that Tudor had admitted to operating the boat at the time of the accident. Tudor was available to testify directly rather than through a third-party witness, who at best merely could have provided hearsay.

The issue at trial was not complex. Several witnesses testified about very basic facts, which were not contradicted but which were substantiated and documented in law enforcement records. The jury received enough evidence about the elements of the charges to be able to reach a reasonable conclusion. Additionally, the Commonwealth observes that if this witness had been “so indispensable” to Eicher’s case, he could have moved the court to issue a bench warrant pursuant to RCr 7.02. He did not elect to invoke that rule.

Pursuant to the *Benham* standard for directed verdict and the *Snodgrass* factors governing a motion to grant a continuance, we conclude that the trial court committed no error.

We affirm the judgment of the Spencer Circuit Court.

ALL CONCUR.

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