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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000366-MR

PATRICIA ANN PARTIN — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
ACTION NO. 06-CR-00099

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

TAYLOR, JUDGE: Patricia Ann Partin brings this appeal from a January 31, 2007, judgment of the Bell Circuit Court upon a jury verdict of guilty to first-degree wanton endangerment and with being a persistent felony offender. We affirm.

Partin was indicted by a Bell County Grand Jury upon wanton endangerment in the first degree, criminal mischief in the first degree, and for being a

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

persistent felony offender in the second degree. These charges stemmed from Partin setting a fire in her cell while incarcerated at the Bell County Detention Center. The court granted the Commonwealth's motion to dismiss the criminal mischief count. A jury trial followed. The court instructed the jury on both wanton endangerment in the first degree and wanton endangerment in the second degree. The jury ultimately found Partin guilty of wanton endangerment in the first degree and of being a persistent felony offender in the second degree. The court sentenced Partin to a total of six years' imprisonment. This appeal follows.

Partin contends the trial court erred by denying her motion for directed verdict of acquittal upon the charge of wanton endangerment in the first degree. A defendant is entitled to a directed verdict of acquittal if viewing the evidence in a light most favorable to the Commonwealth it would have been clearly unreasonable for a jury to have found guilt. Ky. R. Civ. P. (CR) 50.01; *Thacker v. Com.*, 194 S.W.3d 287 (Ky. 2006).

Wanton endangerment in the first degree is defined in Kentucky Revised Statutes (KRS) 508.060 as:

> (1) 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.

Partin asserts that starting a fire in her jail cell did not manifest extreme indifference to the value of human life creating a substantial danger of death or serious physical injury as required by KRS 508.060. Specifically, Partin argues:

> A small flame in a fire-proof building, extinguished by waving one's hands, is distinguishable from a roaring fire. It is that factual distinction which should have led the trial court to grant the motion for directed verdict as to the first[-]degree wanton endangerment charged faced by Patricia Partin. Though Jailer Jimmy Hoskins described fanning the wee flame out with his hands, such an action would usually increase a serious fire.
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> . . . .
>
> The fact scenario in the case at bar shows that Patricia Partin was, at worst, disruptive. She had difficulty getting along with other inmates and with staff. Disruptive, however, does not amount to an effort to place others' lives in peril. Patricia Partin was a pain in the keester but not vicious or homicidal.

Partin's Brief at 3-5. As such, Partin believes it was error for the trial court to deny her motion for a directed verdict of acquittal upon the offense of first-degree wanton endangerment. We disagree.

As noted, a person is guilty of first-degree wanton endangerment when with extreme indifference to the value of human life he wantonly engages in conduct that creates a substantial danger of death or serious physical injury. KRS 501.020(3) defines "wantonly," as follows:

> "Wantonly"--A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he 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. . . .

The Court of Appeals has cited the following as examples of conduct constituting wanton endangerment: discharging or brandishing firearms in public, utilizing firearms or explosives in a grossly careless manner, and obstructing public highways. *Hancock v. Com.*, 998 S.W.2d 496 (Ky.App. 1998). However, it has also been observed that wanton endangerment is not limited to specific types of conduct but, rather, "may be committed in many ways." *Id.* at 498 (quoting *Hardin v. Com., 573* S.W.2d 657, 660 (Ky. 1978)).

In the case *sub judice*, Partin's act of starting a fire in her jail cell while approximately seventy-eight other prisoners were locked inside their cells was sufficient to constitute an extreme indifference to human life that created a substantial danger of death or serious physical injury to others. The fact that Partin's jail cell was constructed of fire retardant materials did not guarantee the fire would be contained. Moreover, the fire also created a risk of death or serious physical injury from fumes or smoke spreading throughout the jail and from a panic of other inmates if the fire, smoke, or fumes spread.

As such, we conclude that a reasonable juror could have found Partin's act of starting a fire in her jail cell sufficient to constitute an extreme indifference to the value of human life thereby creating a substantial danger of death or serious physical injury to another. Therefore, we do not believe the circuit court erred by denying Partin's motion for a directed verdict of acquittal upon first-degree wanton endangerment.

Partin next contends the trial court erred by excluding certain testimony of police officer Daniel Tuttle regarding events occurring between the time Partin was arrested and when the fire was started by Partin.

Ky. R. Evid. (KRE) 103 sets forth the proper procedure for preserving a claim of error concerning the exclusion of evidence. KRE 103[2] states, in relevant part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> . . . .
>
> (2) Offer of proof. In case the ruling is one excluding, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.

It is well-settled that an allegation of error regarding excluded evidence must be preserved by requesting the trial court to enter the evidence into the record by avowal or by counsel offering a proffer of the evidence. *Hart v. Com.*, 116 S.W.3d 481 (Ky. 2003). Without the avowal or proffer, a reviewing court is simply unable to determine the substance of the excluded evidence and, thus, whether exclusion of the evidence was prejudicial. *Id.*

In this case, Partin did not request that Officer Tuttle's excluded testimony be placed in the record by avowal and did not offer a proffer of such testimony. As such,

[2] We observe that Ky. R. Evid. (KRE) 103 was amended effective May 1, 2007. Our analysis, however, proceeds under the prior version of KRE 103.

the issue concerning the exclusion of such testimony was not preserved for our review, and we will not review same. *See Hart*, 116 S.W.3d 481.

Partin next argues that "prosecutorial misconduct" occurred when the Commonwealth referred to Partin's trial counsel as "the public advocate," thus requiring a mistrial. Partin concedes that this issue is unpreserved for appellate review but requests this Court review the issue under the substantial error rule of Ky. R. Crim. P. (RCr) 10.26.

RCr 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

To prevail under RCr 10.26, a defendant must demonstrate that his substantial rights were affected resulting in manifest injustice. *Schoenbachler v. Com.*, 95 S.W.3d 830 (Ky. 2003).

Here, the Commonwealth's reference to Partin's trial counsel as the "public advocate" simply did not rise to the level of manifest injustice under RCr 10.26. Such alleged error did not affect a substantial right of Partin, and considering the evidence amassed against Partin, there exists no reasonable probability that a jury would have returned a not guilty verdict absent the error. Accordingly, we hold that Partin is not entitled to relief under RCr 10.26.

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

ALL CONCUR.

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