RENDERED: MAY 22, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000387-MR

ANGELLA PRATER APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 05-CR-00089

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Angella Prater appeals from a judgment of the Breathitt Circuit Court wherein she was convicted of the criminal offense of reckless homicide and was sentenced to five years in prison. Because we conclude

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

that the trial court erred in allowing the Commonwealth to impeach Prater's testimony by using collateral facts, we vacate and remand for a new trial.

On May 21, 2004, at approximately 10:30 a.m., Prater was involved in a single-vehicle accident that resulted in the death of her two-year-old son, Jayven, who was a passenger in a truck driven by Prater. The accident occurred when Prater drove her truck off the road and into a tree. Jayven died from blunt impact trauma to the head. He had not been restrained by being placed in a child restraint system prior to the accident.[2]

Following the accident, Prater's blood was tested for alcohol and drugs. The test, conducted by the Kentucky State Police, was negative for alcohol. The test was positive, however, for Tramadol, Methadone, and Zoloft, although all were at or below therapeutic levels. Prater testified that she had taken the medications the day before the accident but had not taken any that day.

Approximately one year later, a Breathitt County grand jury indicted Prater on a charge of reckless homicide, a Class D felony. She was tried and convicted in January 2008. In accordance with the jury's recommendation, the court sentenced Prater to five years in prison. This appeal followed.

Prater raises three issues for our consideration. First, she contends that the trial court erred in allowing the Commonwealth to impeach her testimony by introducing prejudicial evidence of collateral facts. Second, she argues that the trial court erred by not admonishing the jury that the failure to place the child in a

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[2] Prater testified that the child had been secured by a seat belt, although that was disputed.

child restraint system was not considered reckless conduct. Finally, she asserts that the trial court erred by not granting her motion for a directed verdict due to insufficiency of the evidence.

The first issue concerns rebuttal evidence introduced by the Commonwealth that the drugs in Prater's system were not ingested by her pursuant to a prescription given to her following nasal surgery. Prater testified that she had been prescribed the pain medications (Tramadol and Methadone) in her system following nasal surgery and that the Zoloft had been prescribed by a counselor. Following that testimony, the Commonwealth obtained and introduced into evidence Prater's physician's medical records, demonstrating that the nasal surgery occurred in December 2006, over two years after the accident. Prater was recalled as a witness and testified that she was confused and actually had an ankle injury prior to taking the medication that was in her system at the time of the accident. In its closing argument, the Commonwealth argued to the jury that the type of medication in Prater's system was not prescribed to her until two years after the accident and that Prater was trying to deceive the jury.

Prater argues that the medical records relating to her prescriptions were collateral facts that were erroneously allowed by the trial court to be introduced into evidence. Among other cases, she cites *Purcell v. Commonwealth*, 149 S.W.3d 382 (Ky. 2004), to support her argument. In that case, the Kentucky Supreme Court stated that "[a]lthough there is no provision in the Kentucky Rules of Evidence prohibiting impeachment on collateral facts, we have continued to

recognize that prohibition as a valid principle of evidence." *Id*. at 397-98. *See also Matheney v. Commonwealth*, 191 S.W.3d 599, 607 (Ky. 2006) ("The law in Kentucky has consistently prohibited impeachment on collateral facts.").

The Commonwealth responds to this argument by first asserting that Prater did not preserve the issue for our appellate review.[3] It states that Prater's trial counsel objected to the introduction of the evidence on the grounds of relevancy rather than on the grounds that the evidence would constitute improper impeachment on a collateral matter. The Commonwealth states that Prater is not permitted to "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). *See also Fairrow v. Commonwealth*, 175 S.W.3d 601, 607 (Ky. 2005) ("[w]hen a party states grounds for an objection at trial, that party cannot assert a different basis for the objection on appeal.").

"A matter is considered collateral if 'the matter itself is not relevant in the litigation to establish a fact or consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness.'" *Simmons v. Small*, 986 S.W.2d 452, 455 (Ky. App. 1998) (quoting *United States v. Beauchamp*, 986 F.2d 1, 4 (1st Cir. 1993), which quoted 1 *McCormick on Evidence* § 45 at 169). "'Relevant evidence' means evidence having any tendency to make

[3] Kentucky Rules of Evidence (KRE) 103(a)(1) requires that a party objecting to the introduction of evidence must make a timely objection "stating the specific ground of objection, if the specific ground was not apparent from the record."

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

Although Prater did not use the words "collateral" or "impeachment" when she entered her objection, we conclude that her objection to the relevancy of the evidence was sufficient to preserve her objection to its admissibility on the ground that it was collateral to the issues in the trial. Collateral evidence is evidence that is irrelevant to the proceedings. *See Simmons, supra*.[4]

The Commonwealth's other response to Prater's collateral facts argument is that "the Appellant is simply incorrect in arguing that the evidence concerning the use of prescription drugs was a collateral matter." In other words, the Commonwealth argues that the fact Prater had drugs in her system was a relevant fact and was not collateral to the issues in the trial. We agree. This argument, however, overlooks the point that Prater does not contend that the drugs in her system were not an admissible fact. Rather, she is arguing that the circumstances under which she took them was not an admissible fact but rather involved facts collateral to the case.

We agree with Prater that the court erred to her substantial prejudice in allowing the Commonwealth to introduce evidence that impeached her testimony that the pain medication in her system was the result of prescriptions connected to nasal surgery. Prater admitted that she had taken the drugs the day

[4] Even if we had determined that Prater had not properly preserved her objection to the evidence, we would have found that the error made by the court, as set forth below, was a palpable one, thus allowing her relief under KRE 103(e).

before the accident, and she didn't contest the test results. As Prater argues in her brief, it was of no consequence whether she ingested the medication in connection with nasal surgery or in connection with an ankle injury, or whether she ingested the medication for any other purpose. The evidence was "not relevant for a purpose other than the contradiction of the in-court testimony," was introduced for the improper purpose of raising inferences prejudicial to Prater,[5] and was thus collateral to the issues in the trial. *See Simmons, supra*. We therefore vacate the judgment and remand for a new trial due to prejudicial error in connection with this issue.

Prater's second argument is that the trial court erred by not admonishing the jury that her failure to place the child in a child restraint system was not to be considered as reckless conduct. KRS 507.050 sets forth the offense of reckless homicide. The statute states that "[a] person is guilty of reckless homicide when, with recklessness he causes the death of another person." KRS 507.050 (1). KRS 501.020(4) defines "recklessly" as:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive 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 failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

[5] The inferences prejudicial to Prater included that she may have purchased or possessed the drugs illegally, that she may have ingested the drugs for reasons other than in connection with an injury or other medical condition, and that she may have been untruthful with her testimony.

Id.

KRS 189.125(3) provides that a driver of a motor vehicle transporting a child shall have the child secured in a child restraint system if the child is 40 inches in height or less. Prater's son, Jayven, was 34 inches tall at the time of the accident. KRS 189.125(5) provides in part that:

> Failure to use a child passenger restraint system . . . shall not be considered as contributory negligence, nor shall such failure to use a passenger restraint system . . . be admissible as evidence in the trial of any civil action. Failure of any person to wear a seat belt shall not constitute negligence per se.

Id.

Prater argues that because the failure to use a child restraint system may not be considered as contributory negligence in a civil trial, it should likewise not be admissible in a trial of a criminal case. In support of her argument, she cites *Commonwealth v. Mitchell*, 41 S.W.3d 434 (Ky. 2001). In that case, a father was driving a motor vehicle with his wife and three children as passengers. He failed to yield a right of way and struck another vehicle, resulting in the death of one of his children. The child had not been secured in a child restraint system as required by KRS 189.125(3).

In reversing the father's conviction for the offense of reckless homicide, the Kentucky Supreme Court held that "the legislature did not intend to elevate a violation of this statute to the Class D felony of reckless homicide." *Commonwealth v. Mitchell* at 435. The court also stated:

> Here, the Commonwealth presented no evidence to support its position that the conduct of the father was reckless other than the failure to secure the infant in a proper child restraint system. This conduct, standing alone, without any other evidence of recklessness is not sufficient to constitute the standard of recklessness required by KRS 507.050, which is a gross deviation from the standard of care that a reasonable person would observe in the situation. *Cf. Robinson v. Commonwealth*, Ky.App., 569 S.W.2d 183 (Ky. 1978).
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> The Court of Appeals reasoned that if the legislature recognized that failure to restrain did not constitute civil negligence per se, then the violation could not satisfy the gross deviation requirement of recklessness. This is a reasonable rationale in this case and should not be interpreted as a bar to criminal prosecution in general. Here, the evidence was insufficient to support a conviction for reckless homicide.

Id. at 435-36.

We do not read the *Mitchell* case as holding that the failure to place a child in a child restraint system may never be used as evidence of reckless conduct in supporting a conviction for reckless homicide. In *Mitchell*, the court affirmed the reversal of the conviction because there was no evidence of recklessness other than the failure to secure the child in a proper child restraint system. *Id*. at 435. In this case, however, there was additional evidence that Prater was driving fast, had drugs in her system, and was inattentive. We are not persuaded by Prater's argument that the court erred in denying her request for an admonition that the jury should not consider her failure to properly secure the child as evidence of her recklessness.

Prater's last argument is that the trial court erred in not granting her motion for a directed verdict due to insufficiency of the evidence. She states that there was no evidence that she was impaired by drugs, that her failure to use a child restraint system was reckless conduct or that it caused the child's death, or that she was exceeding the speed limit. Rather, she points to evidence that a tire came off her truck immediately prior to her truck striking the tree.

In *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), the Kentucky Supreme Court stated the standard for directed verdict motions:

> On 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. 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.

Id. at 187. "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." *Id*.

There was evidence that Prater was driving fast and that she was inattentive. Prater cites *Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994), in an attempt to negate this evidence. In reversing a coal truck driver's wanton murder conviction, the Kentucky Supreme Court in *Johnson* stated that "[n]o evidence was introduced by the Commonwealth of extreme speed or even that the

Appellant was exceeding the speed limit." *Id*. at 953. The court concluded that none of the evidence presented by the Commonwealth established "conduct which rises to the level of manifesting extreme indifference to human life." *Id*. Prater asserts that *Johnson* stands for the proposition that failure to introduce evidence that the speed limit was exceeded was insufficient to support a reckless homicide conviction. We disagree.

First, in *Johnson* the court was addressing the standard of the sufficiency of the evidence in the context of a wanton murder charge rather than a reckless homicide charge. While the *Johnson* court may not have concluded that the conduct in that case rose to the level of manifesting extreme indifference to human life, that does not mean Prater's conduct in this case did not rise to the level of recklessness. Further, while in *Johnson* there was no testimony of extreme speed or even that the driver was exceeding the speed limit, there was evidence in this case that Prater was driving "fast," that she was weaving, and that she was not looking at the road. Testimony that Prater was actually exceeding the speed limit was not essential as supporting evidence of guilt.

In addition to evidence that Prater was driving fast, there was evidence that the child was seen standing in the front seat of the truck immediately before the accident and that Prater had not properly secured him in a child restraint system. Further, there was evidence that Prater had drugs in her system from which a jury could reasonably infer impaired her ability to operate a motor vehicle

in a safe manner. *See Berryman v. Commonwealth*, 237 S.W.3d 175, 178-79 (Ky. 2007).

We conclude that the evidence was sufficient to induce a reasonable juror to believe that Prater was guilty beyond a reasonable doubt of the crime of reckless homicide. *See Benham, supra*. Therefore, the trial court correctly denied Prater's motion for a directed verdict.

Nevertheless, we vacate the judgment and remand this case for a new trial due to error in allowing the Commonwealth to improperly introduce prejudicial evidence of collateral facts to impeach Prater's testimony.

ALL CONCUR.

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