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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000459-MR

ROCKY WICKER — APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIMBERLY C. CHILDERS, JUDGE
ACTION NO. 13-CR-00082

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Rocky Wicker appeals from the Knott Circuit Court's judgment and sentence following a jury trial, entered January 23, 2015. Wicker was convicted of attempted murder, attempted manslaughter, and two counts of first-degree wanton endangerment, and he was sentenced to seventeen-years' imprisonment. We affirm the circuit court's judgment.

On October 24, 2013, the Knott County grand jury indicted Wicker on two counts of attempted murder and two counts of first-degree wanton endangerment. These charges stemmed from an incident on September 9, 2013, in Mousie, Kentucky, in which Wicker discharged multiple shotgun blasts at four officers employed by the Kentucky Department of Corrections, Division of Probation and Parole, who were attempting to determine the location of his son, Rocky Wicker, Junior ("Wicker Jr.").

As a "fugitive officer" for the Department of Corrections, Officer Brian Melvin was tasked with seeking out and arresting probationers and parolees who had absconded from supervision. At the time of the incident, there were approximately 170 absconders in Officer Melvin's jurisdiction. Accompanied by fellow probation and parole officers Olivia Newsome, Sloane Dixon-Marcum, and Donald Joseph Ratliff, Officer Melvin was following up on a tip that one of his assigned absconders, Wicker Jr., could be found at a particular residence in the Mousie area. The four officers proceeded to the described location where they saw a pickup truck with Wicker in the driver's seat, Wicker Jr. in the passenger seat, and an unidentified woman in the middle. The four officers pulled up behind the truck in their government-owned minivan, a white Dodge Caravan with the seal of the Commonwealth of Kentucky displayed on the side of the vehicle. Because Officer Melvin had received information indicating Wicker Jr. was possibly armed, he approached the pickup truck with his service weapon drawn, and shouted, "Probation and parole! Rocky, step out of the vehicle!" Officer Melvin saw

Wicker Jr. turn around within the vehicle to look at him, and then the truck sped away.

The four officers did not pursue the truck, but continued to surveil the residence. They parked the van approximately two hundred feet away, at a vantage point that would allow them to observe the front of the house. About fifteen minutes later, Officer Melvin saw Wicker walking across the front porch. The officers proceeded in their vehicle down the road toward the residence, with Officer Ratliff driving, Officer Melvin in the front passenger seat, and Officers Newsome and Dixon-Marcum in the seats behind them. Officer Melvin exited the vehicle and began to walk toward the front porch, with the goal of asking Wicker where he could find Wicker Jr. Officer Melvin was wearing a bulletproof vest over a polo shirt and wore his badge on his belt next to his service weapon. He heard Wicker say something from the front porch. Wicker then fired twice at Officer Melvin with a shotgun from a distance of about twenty feet away. One shot hit Officer Melvin, striking his forearm, upper-left bicep, and an area of his chest unprotected by the vest. The second shot struck the driver's side window of the state van. Officer Ratliff, still in the driver's seat, was not hit by the shotgun pellets, but suffered injuries to his head and arm from the shattered glass. Officer Melvin provided covering fire with his service weapon in order to allow the other officers to retreat from the vehicle. All of the officers testified that Officer Melvin was the only one of them to draw and fire a weapon.

In his defense, Wicker testified that he had sped away earlier in his pickup truck because he had been told that there were bounty hunters looking for Wicker Jr. with an order to "shoot to kill," and he did not know the person approaching his truck with a drawn firearm. Contrary to the officers' testimony, Wicker testified that he was not the first one to fire a weapon, and he only returned fire with his shotgun after multiple officers shot at him. In support of his narrative, multiple witnesses testified as to their belief that one or more other officers besides Officer Melvin fired at Wicker's house. Wicker also testified he had no idea who the officers were and thought they were either the aforementioned bounty hunters or "Rasters," apparently members of a rival family. After exchanging fire with Officer Melvin, Wicker telephoned 911 from within his house, requesting assistance. When police arrived, Wicker peacefully exited the residence and was placed under arrest.

Wicker was found guilty at a jury trial on the following charges: attempted murder[1] with regard to Officer Melvin, attempted first-degree manslaughter[2] with regard to Officer Ratliff, and two counts of first-degree wanton endangerment[3] with regard to Officers Newsome and Dixon-Marcum. At the guilt phase of the trial, Wicker and the Commonwealth agreed to the following sentence

[1] Murder is defined in Kentucky Revised Statutes (KRS) 507.020. The criminal attempt statute, KRS 506.010, assigns a lesser degree of culpability for attempts than for completed offenses. Murder, ordinarily a capital offense upon completion, is punishable as a Class B felony under the latter statute.

[2] First-degree manslaughter is a Class B offense under KRS 507.030. The attempt to commit this offense is considered a Class C felony under KRS 506.010(4).

[3] KRS 508.060, a Class D felony.

on his convictions: ten years for attempted murder, five years for attempted manslaughter, and one year each for the wanton endangerment charges, to be served consecutively for a total of seventeen years' imprisonment. The circuit court entered final judgment in accordance with the agreement on January 23, 2015. This appeal follows.

Wicker presents three issues before this Court on appeal. For his first issue, Wicker contends that the circuit court erred in not granting a directed verdict on the charges.

> 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.

Perdue v. Commonwealth, 411 S.W.3d 786, 790 (Ky. App. 2013), citing *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Furthermore, "[t]o defeat a directed verdict motion, the Commonwealth must only produce 'more than a mere scintilla of evidence.'" *Lackey v. Commonwealth*, 468 S.W.3d 348, 352 (Ky. 2015), quoting *Benham*, 816 S.W.2d at 187.

For the charge of attempted murder, the jury was required to find (1) Wicker shot Officer Melvin with a firearm; (2) that it was his intention to kill Officer Melvin; (3) that his actions constituted a substantial step in a course of conduct planned to result in Officer Melvin's death; (4) that Wicker was not acting under the influence of extreme emotional disturbance; and (5) that Wicker was not privileged to act in self-protection. For the charge of attempted manslaughter, the jury was required to find a similar set of elements with regard to Officer Ratliff, except that Wicker may have been acting under extreme emotional disturbance. For the charges of first-degree wanton endangerment against Officers Newsome and Dixon-Marcum, the jury was required to find (1) Wicker shot a firearm into a vehicle occupied by the victim; (2) that he thereby wantonly created a substantial danger of death or serious physical injury to the victim; (3) that such conduct manifested extreme indifference to the value of human life; and (4) that he was not privileged to act in self-protection.

Wicker contends that the Commonwealth did not meet its burden. However, trial testimony from the four officers indicated that Wicker fired a shotgun twice in their direction from about twenty feet away. The pellets from the shotgun struck Officer Melvin, as well as the state vehicle with the other three officers inside it. The Commonwealth's evidence also included photographs of the damaged vehicle and the wounded officer. "A person is guilty of attempted murder when, with the intent to kill someone, he takes a substantial step toward killing him." *Perry v. Commonwealth*, 839 S.W.2d 268, 273 (Ky. 1992). "A

stipulation by [Appellant] that he shot 'at a marshal,' without any qualification about his intent, would suffice to establish a substantial step towards the crime, and *perhaps* the necessary intent." *Braxton v. United States*, 500 U.S. 344, 349, 111 S.Ct. 1854, 1858, 114 L.Ed.2d 385 (1991) (emphasis in original). Evidence regarding a defendant's state of mind "may be established by circumstantial evidence." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 36 (Ky. 2011). Despite some testimony from Wicker and other witnesses contradicting the officers' version of the narrative, questions as to the credibility and weight of testimony are properly reserved for the jury. Considering the evidence as a whole and in the light most favorable to the Commonwealth, we cannot state that it was "clearly unreasonable for a jury to find guilt." *Benham*, 816 S.W.2d at 187.

For his second issue, Wicker contends that the circuit court erred in refusing to grant a jury instruction on second-degree wanton endangerment with regard to Officers Newsome and Dixon-Marcum. Wicker points out, correctly, that second-degree wanton endangerment is considered a lesser-included offense of first-degree wanton endangerment. However, "a lesser-included offense instruction is available only when supported by the evidence." *Darcy v. Commonwealth*, 441 S.W.3d 77, 87 n.30 (Ky. 2014), quoting *White v. Commonwealth*, 178 S.W.3d 470, 490 (Ky. 2005). Furthermore, there is case law supporting the proposition that it is not always appropriate to provide an instruction on second-degree wanton endangerment as a lesser-included offense to first-degree wanton endangerment:

> It is immediately obvious that evidence which will sustain a conviction for first degree wanton endangerment is also sufficient to sustain a conviction for second degree wanton endangerment. That is not to say, however, that an instruction on the lesser included offense must always be given.
>
> Our cases have now established that an instruction on a lesser included offense is not required unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but yet conclude that he is guilty of a lesser included offense.

Combs v. Commonwealth, 652 S.W.2d 859, 861 (Ky. 1983) (citations omitted). Ultimately, the *Combs* court found no error in the lower court's refusal to give the second-degree wanton endangerment instruction, holding that "a reasonable juror could not doubt that [Appellant] acted wantonly under circumstances which manifested an extreme indifference to the value of human life and, likewise, a reasonable juror could not doubt that his conduct created a substantial danger of death or serious physical injury to another person." *Id*.

Applying these principles to the facts of this case, we likewise decline to assign error for the circuit court's refusal to instruct on second-degree wanton endangerment. Firing a gun *aimlessly* in public is the epitome of second-degree wanton endangerment, but "[f]iring a weapon in the immediate vicinity of others is the prototype of first degree wanton endangerment. This would include the firing of weapons into occupied vehicles or buildings." *Swan v. Commonwealth*, 384 S.W.3d 77, 102 (Ky. 2012), quoting Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 9–4(b)(2), at 388 n.142 (1998). The evidence in this

case does not support the proposition that Wicker was aimlessly firing his weapon, in a manner characteristic of second-degree wanton endangerment. He fired his shotgun twice *toward* Officer Melvin and the government vehicle containing the other three officers. A reasonable juror could only conclude that Wicker "acted wantonly under circumstances which manifested an extreme indifference to the value of human life and . . . that his conduct created a substantial danger of death or serious physical injury to another person." *Combs*, 652 S.W.2d at 861. We find the circuit court did not err in its denial of the second-degree wanton endangerment instruction.

For his final issue, Wicker asserts that the circuit court erred in levying court costs against him, despite his indigency. Because the issue is unpreserved, Wicker requests palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26.[4] Wicker was represented throughout his trial by private counsel. At sentencing on January 22, 2015, the circuit court ordered Wicker to pay $130 in court costs, and counsel did not object to the imposition. Later in the proceeding, counsel orally moved the court for leave to allow Wicker to proceed *in forma pauperis* on appeal. The court requested that Wicker submit the proper paperwork and affidavit for the matter to be considered. Following a

[4] "Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice requires showing a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Young v. Commonwealth*, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted).

hearing held at a later date, Wicker was granted appointed counsel and the ability to proceed *in forma pauperis*.

There is a distinction in our law between a person qualifying as "needy" and thus entitled to a public defender under KRS 31.110, and being "a poor person" as defined by KRS 453.190(2) and thus entitled to a non-imposition of court costs under KRS 23A.205. It is entirely possible to be "needy" without also being "a poor person," as they are two different statutory standards. *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012). Wicker was found to be "needy," granting him the ability to proceed *in forma pauperis*, but there is no indication the circuit court was ever asked to determine whether Wicker qualified as "a poor person" exempt from court costs.

> The assessment of court costs in a judgment fixing sentencing is illegal *only* if it orders a person adjudged to be "poor" to pay costs. Thus, while an appellate court may reverse court costs on appeal to rectify an illegal sentence, we will not go so far as to remand a facially-valid sentence to determine if there was in fact error. If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be an indigent or poor person before imposing court costs, then there is no error to correct on appeal.

Spicer v. Commonwealth, 442 S.W.3d 26, 35 (Ky. 2014) (emphasis in original). Wicker was represented by private counsel during his trial and never asked the circuit court for a determination that he was "a poor person" unable to pay court costs. In such cases, *Spicer* tells us "there is no error to correct on appeal." *Id*.

For the foregoing reasons, we affirm the judgment and sentence entered by the circuit court.

ALL CONCUR

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