

RENDERED: March 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2676-MR

MICHAEL KERR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 96-CR-0322

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

*** *** *** ***

BEFORE: GUIDUGLI, KNOX, and MILLER, Judges.

MILLER, JUDGE: Michael Kerr (Kerr) brings this appeal from a September 17, 1996 judgment of the Fayette Circuit Court. We affirm.

The facts are these: Kerr and Kim Adkins (Adkins) dated from November 1995 through February 1996. On February 16, 1996, the couple attended a party. At approximately 11:00 p.m., Kerr became angry at Adkins and left the party without her. About an hour later, Adkins went to Kerr's apartment to retrieve her belongings. As she was packing, Kerr struck her on the head, back, and neck with a "mag" flashlight. The emergency squad was called, and Adkins was taken to the hospital for treatment.

Subsequently, Kerr was indicted on one count of assault in the second degree (Ky. Rev. Stat. (KRS) 508.020) and one count of unlawful imprisonment in the first degree (KRS 509.020). A jury trial was held on August 1, 1996, wherein Kerr was found guilty of assault in the second degree and unlawful imprisonment. He was sentenced concurrently to five years' imprisonment on the first count and one year on the second count. This appeal followed.

Kerr argues that he was denied due process of law when the trial court overruled his motions for a directed verdict during trial. Specifically, he maintains that the Commonwealth failed to prove beyond a reasonable doubt 1) that a dangerous instrument was used in the assault and 2) that Adkins suffered a serious physical injury as a result of the assault.

The Kentucky Supreme Court, in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), held that "[o]n 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." In Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the United States Supreme Court opined:

[T]his inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation omitted.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, **any** rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt [emphasis added].

_____ Pursuant to KRS 508.020, a person is guilty of assault in the second degree when:

- a) He intentionally causes serious physical injury to another person; or
- b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
- c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

Whether an object is considered a dangerous instrument is ordinarily a question of fact for the jury. Commonwealth v. Potts, Ky., 884 S.W.2d 654 (1994). The term dangerous instrument is defined in KRS 500.080 as

. . . any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

We believe the Commonwealth presented ample evidence to support the jury's finding that Kerr inflicted physical injury to Adkins by means of a dangerous instrument. Adkins testified that Kerr beat her about the head, neck and shoulders with a mag flashlight. Medical evidence was presented that confirmed Adkins was hit with a blunt instrument. Furthermore, the flashlight used in the assault was introduced into evidence, and a serolo-

gist testified that blood had been found on it. Viewing the evidence as a whole, we are of the opinion that it was not "unreasonable" for a jury to believe that the flashlight was used in the assault and that, under the circumstances in which it was used, it was readily capable of causing death or serious physical injury. As such, we cannot say that the circuit court erred on this issue.

Likewise, we believe Kerr's argument pertaining to the Commonwealth's failure to prove serious physical injury is without merit. We note that proof of "serious" physical injury is required under KRS 508.020(1)(a). In the instant case, however, the Commonwealth proceeded under Subsection (1)(b), which requires proof of "physical" injury. The jury was given the following assault instruction:

- a) that in this County on or about February 17, 1996, the defendant inflicted an injury upon Kim Adkins by striking her with a metal flashlight;
- b) that the flashlight was a dangerous instrument as defined under instruction no. 8; and
- c) that in so doing the defendant intentionally caused **physical injury** to Kim Adkins [emphasis added].

As the jury was not required to believe that Adkins suffered **serious** physical injury to find Kerr guilty of second-degree assault, the Commonwealth was under no burden to present proof of same. As such, we believe the circuit court committed no error.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ann T. Eblen
Louisville, KY

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General
-and-
William L. Daniel II
Assistant Att'y Gen'l
Frankfort, KY