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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001202-MR

CHARLES R. BUSSELL — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 09-CR-00039

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE, WHITE,[1] SENIOR JUDGE.

WHITE, SENIOR JUDGE: Charles R. Bussell appeals from a judgment and sentence of the Bell Circuit Court entered on June 15, 2009. Bussell was convicted by a jury of operating a motor vehicle while under the influence, fleeing or evading

[1] Senior Judge Edwin M. White 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.

police in the second degree, assault in the third degree, and of being a persistent felony offender (PFO) in the second degree. The charges against him stemmed from a physical altercation he had with a police officer after he fled from a traffic stop. We affirm.

The primary witness for the Commonwealth at Bussell's trial was Officer Joey Brigmon of the Middlesboro Police Department. At 11:00 p.m. on December 16, 2008, Officer Brigmon was traveling south on US-25E in his marked police cruiser. He observed Bussell's vehicle traveling north without its headlights on. Office Brigmon also observed that the front driver's side tire was flat. Officer Brigmon crossed the median of the roadway in order to stop Bussell's vehicle. Bussell turned right into a parking lot. Officer Brigmon switched on his police lights, called in Bussell's license plate number, and followed him into the parking lot.

The two men got out of their cars at the same time. Bussell stumbled and then immediately ran toward US-25E. Officer Brigmon shouted, "Police, stop running!" but Bussell continued to flee. Officer Brigmon radioed his location and advised the dispatcher that he was in pursuit of Bussell. Officer Brigmon continued to shout after Bussell as he pursued him. Bussell ran down an embankment and crossed US-25E, which is a heavily-traveled, four-lane highway. Officer Brigmon pursued him across the highway and into the parking lot of a restaurant where he finally caught him.

They had a short altercation and then fell to the ground where they wrestled. Bussell struck Officer Brigmon in the chest with his forearm, temporarily knocking out Officer Brigmon's breath. At that point, Bussell was able to escape. Officer Brigmon recovered and continued the chase, striking Bussell on the back of the shoulder with his baton. Bussell made his way behind the Middlesboro Mall where he crossed a fence into an area where several tractor trailer beds were parked.

Several other police officers had arrived by this time. One of them, Sergeant Spurlock, ordered Bussell to put his hands in the air and to get on his knees. Bussell ignored the order, even after Spurlock drew his service weapon. Officer Busic of the canine unit ordered Bussell to stop or he would release his dog. He repeated the order, but Bussell continued to approach Spurlock. Busic released the dog, who brought Bussell to the ground. The officers noticed that Bussell smelled strongly of alcohol. Bussell continued to act in a belligerent manner, screaming and cursing at the police. He refused to consent to a blood test. Several empty beer cans and a half-empty bottle of malt liquor were later found in his car.

At his trial, the Commonwealth presented testimony from Officer Brigmon, Sergeant Spurlock, and Officer Busic. Bussell presented no evidence or witnesses in his defense. Bussell received a sentence of one year for the third-degree assault conviction, enhanced to ten years by the PFO in the second degree conviction.

Bussell raises four arguments on appeal: (1) that the trial court erred in denying his motion for a directed verdict on the assault charge; (2) that the jury instructions allowed the jury to convict him of assault in the third degree under two separate theories which led to the likelihood of a lack of unanimity in the verdict; (3) that the jury instructions in the penalty phase permitted him to be convicted under five separate theories which also led to the likelihood of lack of unanimity in the verdict; and (4) the trial court erred when it sua sponte stopped Bussell's defense counsel from questioning Officer Brigmon about his injuries.

Assault in the third degree is defined in KRS 508.025, which states in pertinent part as follows:

> (1) A person is guilty of assault in the third degree when the actor:
>
> > (a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:
> >
> > > 1. A state, county, city, or federal peace officer[.]

"Physical injury" is defined in KRS 500.080(13) as "substantial physical pain or any impairment of physical condition[.]" "Impairment of physical condition" has been defined simply to mean "injury." *Meredith v. Commonwealth*, 628 S.W.2d 887, 888 (Ky. App. 1982).

Bussell argues that there was insufficient evidence that Officer Brigmon had suffered an injury or that he had intended to cause Officer Brigmon a physical injury, to sustain his conviction.

> On a motion for directed verdict of acquittal, all fair and reasonable inferences are drawn in the Commonwealth's favor. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). However, judgment as to the credibility of witnesses and the weight of the evidence are left exclusively to the jury. *Id*.; *see also Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). On appellate review, we determine whether, under the evidence viewed as a whole, it was clearly unreasonable for the jury to have found the defendant guilty. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983).

Fairrow v. Commonwealth, 175 S.W.3d 601, 609 (Ky. 2005).

Bussell contends that it was clearly unreasonable for the jury to return a guilty verdict to the assault charge. Officer Brigmon testified that Bussell "didn't hurt" him and that Officer Brigmon did not have to be treated at a hospital, take off any time from work, or obtain any prescription medications as result of the altercation. Bussell contends that Officer Brigmon's physical injury did not rise to the level of that described in *Covington v. Commonwealth*, 849 S.W.2d 560, 564 (Ky. App. 1992), where the physical injury consisted of a bruise on the face and scratch below the eye which were treated at a hospital emergency room, or in *Parson v. Commonwealth*, 144 S.W.3d 775 (Ky. 2004), where the physical injury caused substantial prolonged pain. By contrast, he argues, Officer Brigmon suffered no injury or pain.

We disagree. In *Key v. Commonwealth*, 840 S.W.2d 827 (Ky. App. 1992), the victim, Springer, was struck from behind with a baseball bat by Kenneth.

> Kenneth's characterization of the injuries suffered by Springer, the crime victim, when he was struck in back with the ball bat as "it simply knocked the wind out of him and supposedly bruised his ribs" is disturbing. To argue that such trauma would not *both* result in "substantial physical pain", and "impairment of physical condition" stretches the human imagination.

Id. at 829 (emphasis in original).

The *Key* court further noted that "KRS 500.080(13) requires only either of these results ["substantial physical pain" or "impairment of physical condition"], not both." *Id.* at n.1.

The facts here are analogous. Simply because Officer Brigmon had no visible signs of injury (such as a bruise or scratch), his physical condition was certainly impaired when the breath was knocked from his body. The evidence also supported a finding that Bussell intended to injure Officer Brigmon. Bussell interprets the evidence as showing that he was merely trying to escape, but the evidence fully supports a finding that Bussell wanted to disable Officer Brigmon physically in order to make an escape.

Bussell also argues that "Brigmon gave a lot more than he got, as the saying goes," and that if this were an assault in the fourth degree charge with a civilian victim, no jury in the world would convict. Whatever the merits of such speculation, it overlooks the fact that Bussell assaulted a police officer who was legitimately attempting to detain him, and it also ignores the purpose of KRS 508.025, in which "the legislature was seeking to protect those individuals who serve this Commonwealth in law enforcement capacities." *Wyatt v.*

Commonwealth, 738 S.W.2d 832, 834 (Ky. App. 1987) (*abrogated on other grounds by McGuire v. Commonwealth*, 885 S.W.2d 931 (Ky. 1994)).

Bussell next argues that the jury instructions were flawed because they permitted him to be convicted of third-degree assault under two separate theories, neither of which was supported by the evidence, which led to the likelihood of a lack of unanimity in the verdict. This issue was not preserved for appeal, but he requests review under the palpable error rule, Kentucky Rules of Criminal Procedure (RCr) 10.26.

The instructions in question stated as follows:

> Third-Degree Assault
>
> You will find the Defendant, Charles R. Bussell, guilty under Count III of the Indictment of the offense of Third-Degree Assault under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Bell County, Kentucky, on or about the 16th day of December, 2008, and before the finding of the Indictment herein, he intentionally caused or attempted to cause physical injury to Officer Joey Brigmon by striking him in the chest;
>
> AND
>
> B. That Officer Joey Brigmon was a Middlesboro City Police Department Officer acting in the course of his official duties and Defendant knew he was acting in the course of such official duties.

Bussell argues that the jurors almost certainly would have been divided as to whether there was an actual injury or whether he perhaps "intended" to cause an injury.

> [W]hen presented with alternate theories of guilt in an instruction, the Commonwealth does not have to show that each juror adhered to the same theory. Rather, the Commonwealth has to show that it has met its burden of proof under all of the alternate theories presented in the instruction. Once that is shown, it becomes irrelevant which theory each individual juror believed. This result ensures that a defendant is convicted on proof beyond a reasonable doubt by all twelve jurors.

Burnett v. Commonwealth, 31 S.W.3d 878, 883 (Ky. 2000).

As we have already held that the evidence in this case supported a jury finding under either theory (actual injury or attempt), the instructions were not improper.

Bussell also contends that the PFO instruction allowed him to be convicted under five separate theories, thus leading to the likelihood that there was a lack of unanimity in the verdict.

The instruction provided as follows:

> You will find the Defendant, Charles R. Bussell, guilty of being a Second-Degree Persistent Felony Offender under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That prior to the 16th day of December, 2008, the Defendant was convicted of Burglary in the Third Degree by final Judgment of the Bell Circuit Court on the 4th day of August, 2008; OR was convicted of Theft By Unlawful Taking or Disposition (over $300) by final

Judgment of the Bell Circuit Court on the 1st day of December, 2008;

AND

B. That he was eighteen (18) years of age or older when he committed the offense which you believe he was so convicted;

AND

C. That pursuant to said prior conviction, he was sentenced to a term of imprisonment of one (1) year or more;

AND

D. (1) That he completed the sentence imposed on him pursuant to said prior conviction no more than five (5) years before the 16th day of December, 2008;

OR
(2) That he was discharged from probation or parole from the sentence imposed on him pursuant to said conviction no more than five (5) years before the 16th day of December, 2008;

OR

(3) That he was on probation, parole, conditional discharge, conditional release, or furlough or appeal bond, from said prior conviction at the time he committed the offense of which you have found him guilty in this case;

OR

(4) That at the time he committed the offense of which you have found him guilty in this case he was in custody for said conviction;

OR

(5) That at the time he committed the offense of which you have found him guilty in this case, he had escaped from custody while serving his sentence for said conviction;

AND

E. That he is now twenty-one (21) years of age or older.

Bussell contends that the five subsections listed under subsection (D) could have confused the jury and raised speculation in their minds as to whether he might have escaped from custody or was out on an appeal bond. We agree that the instructions presented a unanimity problem, since "[a] defendant is denied a unanimous verdict when the jury is presented with alternate theories of guilt in the instructions, one of which is totally unsupported by the evidence." *Burnett*, 31 S.W.3d at 882.

Bussell argues that we must reverse on this issue, or trial courts and prosecutors will simply continue to churn out boiler plate instructions that cover every theory under the statute, confuse jurors, and create multiple opportunities for non-unanimous verdicts. The error was, however, unpreserved, and we must consider whether it resulted in the "manifest injustice" required to warrant relief under the palpable error rule. *See Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). In our view, the instructions were not needlessly confusing. Testimony from Bussell's probation officer established that Bussell was on probation when he committed the offenses in this case. Absent the disputed instruction, Bussell would, in all probability, still have been found to be a PFO II.

There was, therefore, no palpable error requiring reversal of his conviction on that charge.

Finally, Bussell argues that the trial court improperly prevented defense counsel from asking Officer Brigmon whether he had suffered a physical injury. Defense counsel asked Officer Brigmon "You're not claiming you suffered any physical injury, are you?" Officer Brigmon replied "He didn't hurt me." The trial court intervened, stating:

> I don't know if it's appropriate for him to say physical injury, that is for the jury to determine and I'll be giving them a definition of what constitutes physical injury. Don't ask . . . you're asking him to define a legal term, right, the way the question is posed.

Defense counsel replied "Okay, let me ask it a different way," and proceeded to ask Officer Brigmon whether he had needed to go to the hospital or receive any treatment after his encounter with Bussell, whether he had missed any work or required any prescriptions. Officer Brigmon replied "No" to all of these questions. Defense counsel also asked whether he had been able to strike Bussell with his fist and baton afterwards, and Officer Brigmon explained that he was able to strike Bussell with the baton after they started running again.

Bussell argues that the trial's court's intervention prevented defense counsel from making excellent points which "could very well have saved the day" for him. "The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge. This broad rule applies to both criminal and civil cases[.]" *Commonwealth v. Maddox*, 955 S.W.2d 718,

721 (Ky. 1997) (quoting *Moore v. Commonwealth*, 771 S.W.2d 34, 38 (Ky. 1988)). "[A] witness generally cannot testify to conclusions of law." *Tamme v. Commonwealth*, 973 S.W.2d 13, 32 (Ky. 1998). Although the term "physical injury" is used in everyday speech, and the trial court may have shown an overabundance of caution in requesting defense counsel to rephrase the question, it was not an abuse of discretion to do so. Furthermore, through the subsequent cross-examination, defense counsel was able to elicit detailed testimony from Officer Brigmon about every aspect of his encounter with Bussell.

Bussell further argues that it was unfair that the trial court did not intervene when the Commonwealth attorney on redirect examination asked Officer Brigmon, "You did have impairment, didn't you?" to which Officer Brigmon replied, "Yes, it knocked the breath out of me." This alleged error is unpreserved for review, and Bussell has not asked for palpable error review. We therefore need not address it in this opinion. *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005). In any event, the trial court was not required to intervene, nor did its lack of intervention rise to the level of manifest injustice necessary to invoke the palpable error rule.

We affirm the judgment and sentence of the Bell Circuit Court.

CAPERTON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I respectfully dissent from the majority opinion that affirmed Bussell's conviction of third-degree assault. It is apparent that both of the requisite statutory elements were missing since no injury or impairment resulted to Officer Brigmon as reinforced by his own testimony and as demonstrated by his ability to continue his physical efforts to subdue Bussell. Therefore, the trial court should have granted a directed verdict dismissing this charge.

I also dissent with respect to the PFO II instructions, which, as Bussell correctly argues, presented five separate theories for possible conviction. The instruction was confusing and misleading, and it was calculated to subvert the possibility of a unanimous verdict. While Bussell very likely would have been convicted with a proper instruction, he was -- as a matter of due process -- entitled to a proper instruction.

Finally, the repeated and disruptive interventions by the trial court were inappropriate. The commentary by the trial court impeded the testimony of witnesses and distorted any legitimate conclusion that a jury may have drawn from that testimony.

These cumulative errors undermined Bussell's right to a fair trial in a case that should have been a ready conviction for the crimes of which he was clearly culpable – DUI, evading arrest, and PFO II. Instead, these unnecessary errors combined to dictate a reversal as to the third-degree assault charge and the charge of PFO II.

Accordingly, I believe that we are compelled to reverse the charges of third-degree assault and PFO II as a result of these errors.

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