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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002093-MR

LEE ROY HELTON — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 12-CR-00096

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Lee Roy Helton was convicted of third-degree assault, resisting arrest and menacing. In this direct appeal, Helton alleges the trial judge committed reversible error by interrogating him during the trial and denying his motion for a directed verdict on the third-degree assault charge. We conclude the trial judge did not commit palpable error by questioning Helton and he was not entitled to a directed verdict on the third-degree assault charge.

On February 7, 2011, Kentucky State Police Trooper Hared Boggs activated his patrol car lights and stopped Helton's vehicle onto the shoulder of Highway 840 in Harlan County. Boggs approached Helton's vehicle and ordered him to exit. After Helton refused, Boggs again ordered him to exit the vehicle.

Boggs testified Helton exited the car, closed the door, and walked briskly toward Boggs with his fists clinched. Boggs grabbed Helton to remove him from the highway. Helton continued to move toward Boggs and attempted to hit him. Boggs then fired his taser and struck Helton in the chest. Boggs further testified that between taser cycles, Helton refused to comply with Boggs's orders to put his hands behind his back. Helton pulled off one of the taser probes and Boggs again tased Helton.

When Trooper James Hensley arrived at the scene, Helton was on his back and uncooperative. The troopers rolled Helton to his stomach and Helton buried his right hand into his pants. The troopers testified that because they were unsure if Helton possessed a weapon, they escalated the level of force and, pursuant to their training, struck him in the ribs with closed fists. After obtaining control of Helton, he was placed in handcuffs.

The troopers testified Helton continued to argue and resist the troopers as they placed him in Boggs's cruiser. In the cruiser, he repeatedly hit his shoulder and head against the back door window.

Because the troopers were required to notify their supervisor whenever a taser was used, Sgt. Jackie Pickerell arrived at the scene where she

observed Helton screaming and striking his head against the window. She directed Hensley to control Helton's behavior. Hensley testified when he opened the back door to speak to Helton, he leaned sideways and forcibly kicked Hensley in the right thigh causing him immediate pain and to stumble onto the highway. Helton was then locked tightly with a safety belt and transported to the police station.

Helton testified he suffered from various back and knee problems as well as carpal tunnel syndrome, which rendered him unable to make a fist. He further testified that his physical condition made it impossible for him to put his hands behind his back, swing at anyone, or strike his head against the window of the police cruiser. Helton testified that because of the injuries inflicted by the troopers, he was treated at a hospital and currently receives treatment for pain. He denied he attempted to strike Boggs or that he kicked Hensley.

Helton did not produce any medical evidence to substantiate his testimony claiming preexisting medical conditions or that he received medical treatment for injuries allegedly inflicted by the troopers. However, photographs allegedly taken by his girlfriend two days after his arrest for the purpose of showing his injuries were admitted into evidence. Helton testified that the photographs depicted bruises he received from being tased and kicked by police. After the Commonwealth and defense counsel completed examining Helton, the trial judge engaged in the following colloquy:

> Trial Judge: Mr. Bailiff, let me see those photographs please.

Commonwealth Attorney: Your honor, actually, may I approach, just for one particular issue?

Trial Judge: Well, hang on a minute here, I might have a question.

Trial Judge: [To the Jury] I am allowed to ask questions. What I am not allowed to do is take sides. So when I ask a question it's not designed to, it's not 'cause I picked one side or the other or am trying to help one side or the other. When I ask a question it's usually in the interests of justice or to ask something I feel like should have been asked or maybe needs to be asked.

Trial Judge: [To the Appellant] So I want to ask you about these two pictures of your injuries. Now this one, number one is from being tased?

Helton: That's where he tased me.

Trial Judge: And number two is from being kicked, right?

Helton: Yes. I have doctor's report on that, sir.

Trial Judge: Sir?

Helton: I have doctors' reports on that one.

Trial Judge: [Holding up two photographs] Would you agree or disagree that these injuries are basically identical?

Helton: Do what?

Trial Judge: That they're identical?

Helton: No, they're not identical.

Trial Judge: Other than the shape, one of them is?

Helton: (interrupting) One is on right side one is on left side.

Trial Judge: Sir?

Helton: One is on right side, one is on left side.

Trial Judge: I agree. But would you agree though that in appearance they are identical injuries?

Helton: My face, I was on the blacktop, my face was all puffy and red…

Trial Judge: Well, now wait a minute. I am asking you about these pictures, okay? That's it.

Helton: Okay.

Trial Judge: [Holding up photograph] I guess my point that I am asking is, this is the taser injury? The taser injury and the kick injury would appear to have caused identical injuries to you?

Helton: That is where he kicked me.

Trial Judge: How can you tell which is the taser and which is the…

Helton: Because they (inaudible) they tased me, on the, I was standing (inaudible) like this and they kicked me here.

Trial Judge: But it left identical marks on you?

Helton: Do what?

Trial Judge: Both of those injuries left identical marks?

Helton: No they're not identical marks sir. Those are pictures where they take where I was bruised.

Trial Judge: Okay. What is this big black things? Are those supposed to be bruises? Is that what…[pointing to photograph].

Helton: Yeah, that's bruises.

Trial Judge: Is that what those are?

Helton: Yeah. I had an MRI done at the (inaudible) on my ribs. You are welcome to read it.

Trial Judge: This black stuff, that is not any type of foreign substance is it?

Helton: It hurt real bad.

Trial Judge: Sir?

Helton: I have a lot of pain sir. When they tased me there.

Trial Judge: I mean [pointing to photograph] those aren't magic, that is not magic marker is it?

Helton: Do what?

Trial Judge: I said that's not magic marker is it? These black spots…

Helton: Why no! How could that be a magic marker?

Trial Judge: That is what I was asking.

Helton: I have doctor's reports on that.

Trial Judge: Okay. Alright. That is all I have.

Defense counsel did not object to the trial court's questioning.

Helton was acquitted of third-degree assault against Boggs but convicted of third-degree assault against Hensley, resisting arrest and menacing. He was sentenced to concurrent sentences for a total of one-year imprisonment, probated, and $750 in fines imposed. This appeal followed.

Helton concedes the alleged error regarding the trial judge's questions is unpreserved but requests review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. Under the palpable error rule, mere judicial error is insufficient to warrant reversal. A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" *Ernst v. Commonwealth,* 160 S.W.3d 744, 758 (Ky. 2005). Even if an unpreserved error is palpable and prejudicial, relief will not be granted unless it resulted in a manifest injustice. Unless the error so "seriously affected the fairness, integrity, or public reputation of judicial proceedings" as to be "shocking or jurisprudentially intolerable" the judgment will not be reversed. *Martin v. Commonwealth,* 207 S.W.3d 1, 4 (Ky. 2006).

Kentucky Rules of Evidence (KRE) 614(b) states: "The court may interrogate witnesses, whether called by itself or by a party." However, in the commentary, trial judges are cautioned to "use the power sparingly and always with sensitivity to the potential for unfairness to the litigations." KRE 614(b), Drafters' Commentary (1989). As indicated by the commentary, the rule merely codified pre-rule cases that emphasized a trial judge's interrogation of witnesses is "not a practice to be encouraged for it is likely to lead the court into error[.]" *Terry v. Commonwealth*, 153 S.W.3d 794, 802 (Ky. 2005)(quoting *Fyffe v. Commonwealth*, 256 Ky. 145, 75 S.W.2d 788, 780 (1934)). Although a trial judge may properly question a witness to expedite the orderly procedures of the trial when asking "questions in the presence of the jury while the issues still hang in the

balance," judicial interrogation should not be conducted in a way that allows a judge's opinion regarding the guilt or innocence of the defendant to be expressed. *Davidson v. Commonwealth,* 394 S.W.2d 911, 912 (Ky. 1965).

Recognizing the potential peril to the judicial process KRE 614(b) presents, in *Terry*, the Court adopted three factors to determine whether a trial judge properly injected him/herself into the trial:

> First, in a lengthy, complex trial, judicial intervention is often necessary for clarification. Second, if the attorneys in a case are unprepared or obstreperous or if the facts are becoming muddled and neither side is succeeding at attempts to clear them up, judicial intervention may be necessary for clarification. Third, *if a witness is difficult,* if a witness' testimony is unbelievable and counsel fails to adequately probe, or if the witness becomes inadvertently confused, judicial intervention may be needed.

Terry, 153 S.W.3d at 803 (quoting *United States v. Slone,* 833 F.2d 595, 597 (6th Cir.1987)). Foremost, the Court warned, a trial judge must not assume the role of prosecutor. *Id.* With recognition of the limitations on a trial judge's authority to question a witness, we address Helton's claim of palpable error. In doing so, we "must plumb the depths of the proceeding … to determine whether the [alleged] defect in the proceeding was shocking or jurisprudentially intolerable." *Martin,* 207 S.W.3d at 4.

The Commonwealth contends the trial judge acted properly because the alleged bruises in the photographs are an unnatural shade of black and, upon close inspection, individual strokes from a felt-tip marker are visible, yet neither attorney

questioned Helton about the unusual markings. It contends that, consistent with *Terry*, the trial judge was justified in inquiring into Helton's attempt to fabricate evidence.

We would be less than candid if we did not say the markings on Helton's body in the photographs were arguably made using a marker. Nevertheless, a trial judge must use caution when suggesting a defendant's testimony is less than credible and leave such determinations within the exclusive decision of the jury. However, because we are reviewing the alleged error under RCr 10.26, it is not necessary to condone or criticize the trial judge's actions.

With or without the trial judge's questioning, there is a substantial probability that a reasonable juror examining the photographs would not overlook the possibility the alleged bruises depicted were created or enhanced by a marker. Additionally, it is undisputed that Helton, charged with first-degree assault of a police officer, was tased by the officers. Therefore, whether the jurors believed he suffered bruises as a result of the tasing has little, if any, bearing on his guilt or innocence. Indicative of the lack of prejudice to Helton is that he was acquitted of third-degree assault against Boggs and only convicted of third-degree assault against Hensley and received a one-year sentence. After considering the evidence, we are unconvinced that, even if erroneous, the trial judge's questions rose to the level of palpable error.

Helton's final contention is he was entitled to a directed verdict on the third-degree assault charge because the Commonwealth did not establish Helton suffered

a physical injury as defined by KRS 500.080(13). The Commonwealth argues this error is likewise unpreserved for review. Kentucky Rules of Civil Procedure (CR) 50.01 states, "[a] motion for a directed verdict shall state the specific grounds therefor." At trial, defense counsel simply stated the Commonwealth did not prove its case beyond a reasonable doubt. This Court has applied CR 50.01 in criminal cases, and we have recognized a strict adherence approach to the "specific grounds" requirement. *Pate v. Commonwealth,* 134 S.W.3d 593, 597-598 (Ky. 2004). However, in the interest of justice, we have reviewed Helton's argument that he was entitled to a directed verdict on the third-degree assault charge and conclude there was no error.

On review of a denial of 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). We must determine whether, under the evidence viewed as a whole, it was clearly unreasonable for the jury to have found Helton guilty. *Commonwealth v. Sawhill,* 660 S.W.2d 3, 5 (Ky. 1983).

> KRS 508.025 provides:
>
> (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).

Helton argues there was insufficient evidence Hensley suffered an injury or intended to cause Hensley a physical injury. We disagree.

Hensley testified he experienced pain when kicked by Helton and the kick was forceful enough to send Hensley onto the roadway. His testimony was sufficient to establish Helton intentionally caused physical injury to Hensley.

Additionally, although the jury instruction did not include a clause relating an unsuccessful attempt, we conclude there was no reversible error.

> The directed-verdict question is not controlled by the law as described in the jury instructions, but by the statutes creating the offense. Thus, a directed verdict may be inappropriate even though the jury instructions were flawed.
>
> Under this approach, this Court is required to examine the evidence introduced at trial…and to compare that proof to the statutory elements of the offense.

Acosta v. Commonwealth, 391 S.W.3d 809, 816-817 (Ky. 2013)(internal citations omitted).

Hensley's testimony was sufficient to establish Helton's intentional attempt to cause physical injury to Hensley and, therefore, Helton was not entitled to a directed verdict on third-degree assault.

Based on the foregoing, the judgment of the Harlan Circuit Court is affirmed.

ALL CONCUR.

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