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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

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CR-18-0699

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Vermillion Dionne Dailey

v.

State of Alabama

Appeal from Coffee Circuit Court  
(CC-17-614)

McCOOL, Judge.

Vermillion Dionne Dailey appeals her conviction for first-degree assault, a violation of § 13A-6-20, Ala. Code 1975, and her resulting sentence of 78 months' imprisonment. The trial court split Dailey's sentence and ordered Dailey to

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serve 12 months' imprisonment, followed by a 36-month probationary term. For the reasons set forth herein, we affirm that judgment.

Facts and Procedural History

On September 28, 2017, a Coffee County grand jury returned an indictment charging Dailey with first-degree assault under § 13A-6-20(a)(2), Ala. Code 1975, which provides: "A person commits the crime of assault in the first degree if[,] ... [w]ith intent to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of the body of another person, he or she causes such an injury to any person[.]" The evidence presented at trial tended to establish the following facts.

In March 2017, Dailey and Lekisha Lewis were both employed at a Taco Bell fast-food restaurant in Enterprise. Lewis testified that, in the two weeks preceding the incident giving rise to this case, she and Dailey had "argued and ... exchanged words" while working at the restaurant. (R. 55.) According to Lewis, on March 10, 2017, she and Dailey were working at the restaurant and were "just nitpicking back and

forth," i.e., there were "words going back and forth" between them. (R. 25.) Lewis testified that Dailey was "bothering" her throughout the evening and that at one point Dailey "had started getting up close to [her]," which "scared" Lewis. (R. 26.) Lewis reported Dailey's behavior to the manager of the restaurant but, according to Lewis, the manager "didn't do nothing about it." (R. 27.) However, according to Lewis, Dailey later "went outside and scratched [Lewis's] car" (R. 27), and after Lewis reported that incident to the manager, the manager sent both Lewis and Dailey home.

The following day, Lewis returned to work at the restaurant. According to Lewis, when she arrived at the restaurant, she "clocked in" (R. 31), spoke to another employee, and then, as she was "getting ready to turn, [she] was met with grease" thrown from a cup held by Dailey. (R. 33.) According to Lewis, she "didn't do anything" to provoke the alleged assault by Dailey, but, rather, it appeared to Lewis that Dailey "was waiting on [her]." (R. 43.) In fact, Lewis testified, she "didn't even know [Dailey] was there." (R. 49.) Lewis was subsequently transported to a hospital but was released after "five or ten minutes" because "[n]othing

happen[ed] to [her] face," i.e., her face "was just normal." (R. 34.) However, Lewis testified that, "next thing you know, about maybe five or six hours, [her] face got about that big. (Indicating.)" (R. 34.) Lewis testified that she then went to a different hospital where she thought she would receive "better treatment." (R. 35.)

Regarding the injuries she suffered as a result of the alleged assault, Lewis testified that she had scars "from the left side of [her] face on down," "down [her] arm," and on her chest. (R. 38.) The State also introduced into evidence photographs that reflect the scars to which Lewis testified. When asked if those scars were "ever going away," Lewis testified: "No." (R. 39.) In addition, when asked "[w]hat other scarring on your body do you have ... that will not go away because of the grease that was thrown on you," Lewis testified:

"The left side of my face is darker. I had to have my skin pulled in wound care. So this side has less layer of skin than this side. And it bumps up repeatedly in the sun. I can't be in the heat on this -- you know, even if I am, it bumps up really bad on this side."

(R. 40.) Lewis further testified that she has permanently "[l]ost hearing -- a percentage of hearing in [her] left ear

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because the grease ... was inside [her] ear, and it was burnt in there." (R. 42.) Lewis also testified that the grease "burned [her] where [she] couldn't see out of [her] left eye" and that she now permanently has "trouble [seeing] out of [her] left eye," which, she testified, is "blurry." (R. 42.) On cross-examination, however, Lewis testified that she does not wear a hearing aid or corrective lenses and that she does not have any restrictions on her driver's license requiring her to use corrective lenses when she drives.

Investigator Evan Sweeney of the Enterprise Police Department testified that, as part of his investigation into the alleged assault, he interviewed Dailey on March 14, 2017. The State introduced into evidence a transcript of that interview and questioned Inv. Sweeney regarding Dailey's statements. In the interview, Dailey stated that, when Lewis arrived at the restaurant on March 11, 2017, Lewis "had an attitude" and "call[ed] [Dailey] a bitch under her breath" and that, as a result, she (Dailey) "automatically did throw grease on [Lewis]." (C. 59; R. 68-69.) Dailey also stated that, before throwing grease on Lewis, she had told another

employee to "[b]e careful, watch out" because she did not want him to be injured. (C. 62; R. 69-70.)

At the close of the State's case-in-chief, defense counsel moved for a judgment of acquittal. In support of that motion, defense counsel argued:

"[T]here hasn't been proof of disfigurement of the victim, seriously and permanently, or proof of destruction, amputation, or permanent disabling of a member or organ of the victim's body, as required by the language of the statute that applies.

". . . .

"And . . . just generally there hasn't been proof of protracted serious permanent disfigurement, as required by . . . the language of the statute.

"And . . . there hasn't been sufficient testimony with specificity as to disfigurement."

(R. 81-82.) The trial court denied Dailey's motion.

Dailey testified in her own defense. According to Dailey, she became fearful of Lewis in the weeks leading up to the alleged assault because Lewis, who was undisputedly larger than Dailey, had told Dailey on multiple occasions that she would "beat [Dailey's] ass." (R. 90.) Regarding the alleged assault, Dailey testified that, when Lewis arrived at the restaurant on March 11, 2017, Lewis went to the back of the restaurant where Dailey was working and, with "her fist balled

up" (R. 100), "charged at [Dailey]" (R. 96) while saying, "Bitch, I'll fuck you up." (R. 97.) Dailey testified that she was afraid Lewis "was going to bust [her] in the head ... because [Lewis] had stated she would bust [Dailey] in [her] MF head with the hot fry basket a couple of times." (R. 97-98.) Thus, Dailey testified, she threw a cup of grease on Lewis in self-defense. However, Dailey acknowledged on cross-examination that she had not told Inv. Sweeney that Lewis had "charged" her with a "fist balled up" or that Lewis had otherwise threatened her.

As part of its jury charge, the trial court instructed the jury on self-defense, including an instruction on Alabama's stand-your-ground law. See § 13A-2-23(b), Ala. Code 1975 ("A person who is justified ... in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.").

On October 4, 2018, the jury found Dailey guilty of first-degree assault.<sup>1</sup> On February 26, 2019, the trial court

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<sup>1</sup>The trial court had also instructed the jury on the lesser-included offenses of second-degree assault, § 13A-6-21,

sentenced Dailey to 78 months' imprisonment and split the sentence, ordering Dailey to serve 12 months' imprisonment, followed by a 36-month probationary term. Dailey filed a motion for a new trial in which she argued the evidence was insufficient to support her conviction. Specifically, Dailey argued that the evidence was insufficient because, she said, the evidence established that she lawfully used a degree of physical force reasonably necessary to defend herself against what she perceived to be an imminent attack by Lewis. The trial court denied Dailey's motion, and Dailey filed a timely notice of appeal.

#### Analysis

Dailey argues that the State failed to present sufficient evidence to prove a prima facie case of first-degree assault under § 13A-6-20(a)(2).

""In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."" Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998) (quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala.

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Ala. Code 1975; third-degree assault, § 13A-6-22, Ala. Code 1975; and reckless endangerment, § 13A-6-24, Ala. Code 1975.



1985)). "The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt." Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997) (quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992)). "When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision." Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998) (quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990)). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978)."

McGlocklin v. State, 910 So. 2d 154, 156 (Ala. Crim. App. 2005).

As noted, § 13A-6-20(a)(2) provides: "A person commits the crime of assault in the first degree if[,] ... [w]ith intent to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of the body of another person, he or she causes such an injury to any person[.]" According to Dailey, the State failed to present evidence sufficient to prove "the disfiguring injury required for a conviction ... under § 13A-6-20(a)(2)." (Dailey's brief, at 13.) In support of her

argument, Dailey cites Lee v. State, 727 So. 2d 887 (Ala. Crim. App. 1998), for the proposition that "[s]carring in and of itself is not a disfiguring injury as contemplated by § 13A-6-20(a)(2)," although she does not provide any discussion or even a summary of Lee. (Dailey's brief, at 13.)

However, in Hunter v. State, 866 So. 2d 1177 (Ala. Crim. App. 2003), this Court considered whether there was sufficient evidence to sustain a conviction for first-degree assault under § 13A-6-20(a)(1), Ala. Code 1975, which provides: "A person commits the crime of assault in the first degree if[,] ... [w]ith intent to cause serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument." A "serious physical injury" is defined as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ." § 13A-1-2(14), Ala. Code 1975 (emphasis added). In concluding that there was sufficient evidence to sustain the appellant's conviction, this Court stated:

"Here, we focus on the 'serious and protracted disfigurement' element of the statute.

'Disfigurement' is defined as '[a]n impairment or injury to the appearance of a person or thing.' Black's Law Dictionary 480 (7th ed. 1999). 'Protracted' is defined as 'prolong[ed] in time or space.' Merriam-Webster's Collegiate Dictionary (10th ed. 1999). The victim was left with a long wound resulting in an elevated scar in a prominent position on his face. Clearly, the victim in this case was disfigured. The issue then becomes whether the evidence was sufficient to prove that Morris's disfigurement was a 'serious and protracted disfigurement.'

"Most Alabama cases discussing 'serious physical injury' concern 'physical injury which creates a substantial risk of death, or ... protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.' Thus, there is little guidance in Alabama caselaw concerning what constitutes a serious and protracted disfigurement. Some cases discussing serious and protracted disfigurement also discuss the substantial risk of death or protracted impairment of health. See Lee v. State, 727 So. 2d 887 (Ala. Crim. App. 1998) (in which this Court implied that the mere presence of a scar resulting from a gunshot wound will not elevate 'physical injury' to 'serious physical injury'). Other cases do not indicate which part of the statute is implicated. See Pope v. State, 586 So. 2d 1003 (Ala. Crim. App. 1991) (holding that testimony that the victim was hospitalized for three days and was unable to work for one and one-half months and that staples had to be used to hold wound together, along with victim's exhibition of his scars to the jury, was sufficient to present a jury question on the issue of the existence of serious physical injury).

"Other jurisdictions whose definition of serious physical injury, like Alabama's, include a serious and protracted disfigurement have found a scar sufficient to constitute serious physical injury.

See State v. Nival, 42 Conn. App. 307, 678 A.2d 1008 (1996) (where jury observed the victim's one-half-inch facial scar and evidence was presented that the scar was permanent there was sufficient evidence to create jury question as to whether the victim had suffered a serious physical injury); State v. Anderson, 370 N.W.2d 703 (Minn. Ct. App. 1985) (a long scar present two and one-half years after the injury was a serious permanent disfigurement); State v. Bledsoe, 920 S.W.2d 538 (Mo. Ct. App. 1996) (a one-and-one-half-inch cut on the victim's chin leading to scarring, a one-and-one-half-inch scar on lower lip, and a scar between her eyes constituted serious disfigurements); State v. Pettis, 748 S.W.2d 793 (Mo. Ct. App. 1988) (holding that serious physical injury as applied to first-degree assault would include a four-inch permanent scar as a result of a knife wound); People v. Wade, 187 A.D.2d 687, 590 N.Y.S.2d 245 (1992) (a scar that was visible eight months after victim's face was cut with a razor from ear to mouth was serious permanent disfigurement); People v. Greene, 488 N.Y.S.2d 812, 111 A.D.2d 183 (1985) (serious physical injury includes a knife wound on the victim's neck that required 120 stitches to close and that resulted in a substantial keloid scar).

"[The victim's] testimony at trial revealed that more than nine months had passed from the time he sustained his injury. The photographic evidence contained in the record indicated that any scar resulting from the injury would likely be very pronounced. Here, sufficient evidence was presented to create a jury question as to whether the victim had suffered a serious physical injury. Therefore, the trial court did not err in denying Hunter's motion for a judgment of acquittal."

Hunter, 866 So. 2d at 1179-80 (emphasis added).

As noted, the issue in Hunter was whether there was sufficient evidence to prove the victim had suffered a serious and protracted disfigurement, not whether the victim had suffered a serious and permanent disfigurement as required by § 13A-6-20(a)(2). Nevertheless, contrary to Dailey's contention, the analysis in Hunter makes clear that scarring constitutes the disfigurement required for a first-degree-assault conviction. Thus, the question in this case is whether there was sufficient evidence indicating that Lewis suffered serious and permanent scarring as a result of Dailey throwing a cup of hot grease onto her. We conclude that there was such evidence.

Lewis testified that, as a result of the alleged assault, she has been scarred "from the left side of [her] face on down," "down [her] arm," and on her chest. When asked if those scars were "ever going away," Lewis testified: "No." In addition, the jury was able to view those scars in the photographs the State introduced into evidence. See Hunter, supra (citing State v. Nival, 42 Conn. App. 307, 678 A.2d 1008 (1996)), for the proposition that, where the jury observed the victim's facial scar and where evidence was presented that the

scar was permanent, there was sufficient evidence to create jury question as to whether the victim had suffered a serious physical injury). Lewis also testified that "[t]he left side of [her] face is darker," that one side of her face "has less layer of skin," and that those disfigurements are permanent. Considering that evidence in a light most favorable to the State, as we must, McGlocklin, supra, we conclude that Lewis's testimony and the photographic evidence depicting Lewis's scars were sufficient to create a question of fact for the jury as to whether Lewis had suffered a permanent disfigurement as a result of the alleged assault. Hunter, supra. See also Hopson v. State, [Ms. CR-17-1155, April 12, 2019] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2019) (noting, in considering whether there was sufficient evidence of disfigurement, that "[a] layman may generally testify as to his own bodily condition" (citing Charles W. Gamble, McElroy's Alabama Evidence, § 128.10(4) (6th ed. 2009))); and Reck v. State, 84 So. 3d 155, 158 (Ala. 2011) (noting that "a competent person with firsthand knowledge of the victim's ... disfigurement is capable of testifying as to the seriousness of the disfigurement and the passage of time concerning the

disfigurement"). Thus, the State presented sufficient evidence to prove a prima facie case of first-degree assault, and, as a result, the trial court did not err by denying Dailey's motion for a judgment of acquittal and submitting that charge to the jury.

Moreover, in focusing on what she perceives to be the lack of evidence establishing Lewis's permanent disfigurement, Dailey ignores that first-degree assault under § 13A-6-20(a)(2) may be proven by evidence establishing that a person had the intent to cause, and did cause, a permanent disfigurement or had the intent to, and did, "destroy, amputate, or disable permanently a member or organ of the body of another person[.]"<sup>2</sup> (Emphasis added.) Here, Lewis testified that, as a result of the alleged assault, she suffered a permanent "percentage of hearing loss" in her left ear and that she will permanently have "trouble [seeing] out of [her] left eye," and her vision in that eye, she testified, is now "blurry." Section 13A-6-20(a)(2) requires proof of a

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<sup>2</sup>Although Dailey briefly suggests she did not have the requisite intent to sustain a first-degree-assault conviction, it is well settled that the issue of intent, which is rarely capable of direct proof, is normally a question of fact for the jury to resolve. Smoak v. State, 186 So. 3d 493, 502 (Ala. Crim. App. 2015).

permanently disabled organ; it does not require proof of a totally disabled organ. Thus, once again construing the evidence in a light most favorable to the State, as we must, McGlocklin, supra, we conclude that the State presented sufficient evidence from which the jury could have found that Lewis's left ear and left eye were permanently disabled as a result of the alleged assault. Therefore, the State proved a prima facie case of first-degree assault under § 13A-6-20(a)(2), regardless of whether there was evidence establishing that Lewis was permanently disfigured, which there was. Accordingly, for that reason as well, the trial court did not err by denying Dailey's motion for a judgment of acquittal and submitting that charge to the jury.

Dailey also argues that there was insufficient evidence to sustain her conviction for first-degree assault because, she says, the evidence established that the alleged assault was actually an act of self-defense. "When a defendant raises a claim of self-defense, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense." Smith v. State, 279 So. 3d 1199, 1205 (Ala. Crim. App. 2018). Here, Dailey presented evidence from which



the jury could have found that she acted in self-defense, thus injecting the issue of self-defense into the trial. However, Lewis testified that she did not provoke the alleged assault. In fact, Lewis testified that she "didn't even know [Dailey] was there," i.e., at the restaurant, when the alleged assault occurred. Rather, Lewis testified, she merely arrived at work, clocked in, spoke to another employee, and then, as she was "getting ready to turn, [she] was met with grease." Thus, although there was evidence tending to establish that Lewis had threatened Dailey with physical violence in the weeks preceding the alleged assault, Lewis testified that she had not threatened Dailey at any point on the date the alleged assault occurred, much less immediately before the alleged assault. See Raines v. State, 455 So. 2d 967 (Ala. Crim. App. 1984) (holding that there was no evidence to justify a self-defense charge where the evidence established that, although the victim had previously threatened to kill the defendant, there was no evidence establishing that the defendant was in imminent peril when he shot the victim). In addition, the State's evidence established that Dailey had not told Inv. Sweeney that she threw grease on Lewis in an act of self-

defense; rather, Dailey told Inv. Sweeney that she "automatically" threw grease on Lewis when she "heard [Lewis] call [her] a bitch under her breath." Thus, the State presented sufficient evidence to prove that Dailey did not act in self-defense. Therefore, the question whether Dailey acted in self-defense was a question for the jury. See Smith, 279 So. 3d at 1205 ("This Court has repeatedly held that the claim of self-defense is an issue to be decided by the jury."). Accordingly, the trial court properly submitted to the jury both the first-degree-assault charge and the issue of self-defense.

Conclusion

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.