

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002629-MR

GREEN BAILEY MIDDLETON

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE RON JOHNSON, JUDGE  
ACTION NO. 99-CR-00162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, DYCHE, AND MILLER, JUDGES.

MILLER, JUDGE: Green Bailey Middleton brings this appeal from an October 30, 2000, judgment of the Harlan Circuit Court. We affirm.

In October of 1999, the Harlan County Grand Jury indicted appellant upon first degree wanton endangerment (Kentucky Revised Statutes (KRS) 508.060); first degree assault (KRS 508.010); first degree burglary (KRS 511.020); and for being a persistent felony offender in the first degree (KRS 532.080(3)). Generally, it was alleged that appellant forced his way into the home of his former wife, one Marisha Curry, while armed with a pistol and assaulted her therein. The case came on

for trial September 13, 2000, before the court sitting without a jury. The court found appellant guilty of second degree assault, first degree burglary, and of being a first degree persistent felony offender. On October 30, 2000, appellant was sentenced to a total of fifteen years' imprisonment, thus precipitating this appeal.

Appellant contends that there was insufficient evidence to support his conviction for second degree assault. Second degree assault is codified in KRS 508.020:

- (1) 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.

We are not concerned with subsection (a) of 508.020 as both appellant and the Commonwealth agree that the evidence did not sustain a determination that Marisha suffered serious physical injury. Our analysis will focus upon subsection (b).

Appellant maintains that the evidence is insufficient to support the finding that Marisha suffered physical injury or that a deadly or dangerous instrument was used to effectuate the assault. Marisha testified that appellant hit her with a gun in

his hand several times, and that she even fell to the floor twice as a result of being struck. She testified that he threatened to kill her and was very angry. Marisha also stated that as a result of being struck by appellant, one of her teeth broke. It appears that Marisha was taken to the hospital for evaluation. At trial, she also alleged to have suffered broken blood vessels on her face.

We observe that a gun, as a matter of law, is a deadly weapon. KRS 500.080(4); Hicks v. Commonwealth, Ky., 550 S.W.2d 480 (1977). Thus, we think that Marisha's testimony of appellant striking her with a gun in his hand was sufficient to support a finding that appellant used a deadly weapon to perpetrate the assault. We also believe that Marisha suffered physical injury as a result of the assault. KRS 500.080(13) defines physical injury as "substantial physical pain or any impairment of physical condition." Based upon Marisha's testimony that her tooth was knocked out, and that appellant hit her so hard that she fell to the floor twice, we are of the opinion that there was sufficient evidence in the record to support a finding that Marisha suffered physical injury as a result of the assault. Key v. Commonwealth, Ky. App., 840 S.W.2d 827 (1992), Meredith v. Commonwealth, Ky. App., 628 S.W.2d 887 (1982). Upon the whole, we hold that there existed sufficient evidence upon which appellant could have been found guilty beyond a reasonable doubt of assault in the second degree.

Appellant also asserts that the circuit court committed reversible error by allowing the testimony of one Patricia Curry.

On the morning of trial, the Commonwealth revealed to the court that Patricia Curry would be testifying. The Commonwealth Attorney stated that he did not know about the witness until the morning of trial. Appellant objected to the witness, but such objection was overruled by the court. The court determined that any prejudice would be alleviated by permitting defense counsel to speak with Patricia Curry prior to her testimony. Defense counsel interviewed Patricia Curry before her testimony at trial.

Patricia Curry apparently owned the home where Marisha lived at the time of the assault. Marisha and her husband, Robert Curry, both testified that appellant kicked in the door. Marisha and Robert testified that it was not possible to open the door because the deadbolt was stuck, thus supporting their testimony that appellant's entry was forced. Conversely, appellant testified that his entry into the home was permissive. During defense counsel's interview, Curry told defense counsel that neither Robert nor Marisha ever complained to her that the deadbolt on the door was stuck. After the interview and during her testimony, she, however, stated that Robert and Marisha had, in fact, complained about the deadbolt being stuck.

Appellant specifically alleges that "[b]y calling Ms. Pat Curry to testify after being revealed at the last minute, and under circumstances in which she mislead (sic) defense counsel during the court ordered interview, the prosecution was permitted to tip the scales unfairly against the appellant. Exclusion of Ms. Curry's testimony should have been the appropriate remedy here." We disagree. Appellant informed the court of the

inconsistency in Patricia Curry's testimony, and we believe the court could appropriately judge the credibility of Patricia Curry. Additionally, we do not believe that appellant demonstrated any specific prejudice suffered as a result of the delay in disclosing Patricia Curry as a witness. Upon the whole, we are of the opinion that the circuit court did not abuse its discretion in this matter.

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

ALL CONCUR.

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